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Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

OCTOBER TERM, 1993

TOWN OF NAHANT, MASSACHUSETTS,
PETITIONER,

v.

PATRICK J. O'CONNOR,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. In determining that a public employee's speech is constitutionally protected, may the court deliberately ignore its context and form solely because its content relates to the employee's supervisor's fitness to hold office, when the context and form show that the employee was speaking about his own employment dispute and not as a citizen seeking to disclose wrongdoing?

2. When a public employer establishes that an employee directly has confronted his supervisor about the supervisor's conduct and that their required close working relationship has been sufficiently impaired that the agency was unable to effectively handle a public health crisis, has the employer nonetheless failed to demonstrate that its interests in an efficient workplace outweigh the employee's interests in the speech?

LIST OF PARTIES

The parties to the proceedings below were respondent (and plaintiff-appellant) Patrick J. O'Connor; petitioner (and defendant-appellee) Town of Nahant; and additional defendant-appellees Robert Steeves, Harry Edwards, and Richard Lombard.

RULE 29.1 STATEMENT

Petitioner is a Massachusetts municipal corporation with no parent or subsidiary corporations.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to review that part of the judgment and opinion of the United States Court of Appeals for the First Circuit entered on May 28, 1993, vacating and remanding the District Court's judgment. In the alternative, petitioner respectfully requests that this Court summarily reverse that judgment and opinion under *Connick* v. *Myers*, 461 U.S. 138 (1983).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 994 F.2d 905 and is reprinted in the Appendix at A-1. The order of the Court of Appeals denying the petition for rehearing is reprinted in the Appendix at A-25. The opinion of the District Court is not reported and is reprinted in the Appendix at A-26.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1993. A timely petition for rehearing was filed on June 11, 1993 and denied on July 1, 1993. The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C., § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. 1.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. 14.

> Section 1. All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondent filed suit in Massachusetts Superior Court against petitioner and the three members of its Board of Selectmen arising out of his discharge as Superintendent of Public Works. The suit alleged that he was terminated in retaliation for his speech about defendant Steeves' practice of charging items for personal use to petitioner's account; because of his affiliation with a political opponent of Steeves and defendant Edwards; and without procedural due process, all in violation of 42 U.S.C., § 1983. Respondent also raised two state law claims. The case was timely removed to the United States District Court for the District of Massachusetts under 28 U.S.C., §§1331, 1343(3), and 1441(b).[1]

The material, undisputed facts are as follows.[2] In July, 1989, respondent, a political supporter of Selectmen Lombard and Jane Solomine, was appointed Superintendent of Public Works by a 2-1 vote of petitioner's Board of Selectmen, with Steeves (the former Superintendent) voting against [A. 3-4]. Under petitioner's charter, the Selectmen are the Superintendent's immediate supervisors [App. 286-287]. Almost immediately, respondent began confronting Steeves about Steeves' continuing hands on involvement in the department, consist-

[1] Only the "whistleblowing" claim against petitioner is at issue here. The District Court granted defendants' motions for summary judgment as to all claims. Respondent appealed only the judgment on the "whistleblowing" and "political affiliation" claims, and the Court of Appeals affirmed as to the latter. It also affirmed the District Court's finding that the individual defendants were entitled to qualified immunity on both claims.

[2] References to the Appendix to this petition are designated by "A." References to the Appendix filed in the Court of Appeals are designated by "App."

ing of: dealing directly with subcontractors; directing personnel; and making small purchases on the department's account for non-Town use [A. 4]. With respect to the purchases, Steeves reimbursed the department, but the 5% state sales tax was not paid [A. 4]. Respondent testified that he viewed all three activities by Steeves as different ways in which Steeves "undermined" his authority [App. 234]. Respondent asked Steeves to stop the purchases "so we could have some accountability" [App. 236-38]. Respondent confronted Steeves "on a hundred different occasions" and felt he "stood" in Steeves' way [App. 606, 563]. When Steeves ignored respondent's requests, he complained to Lombard and Solomine about Steeves' conduct, including use of the account [A. 4]. In January or February, 1990, respondent gave the Board a letter which was discussed at a "public" meeting, although there was no evidence that any members of the public were present [A. 4]. Lombard told Steeves to stop using the account [A. 5]. Respondent then wrote an internal memorandum to the department, prohibiting unauthorized purchases, without naming Steeves [App. 808]. When Steeves persisted, respondent addressed another memorandum to the Board in March, 1990, leading Lombard to issue another warning [A. 5]. Again, there was no evidence that the public was present, and Solomine's minutes of the public portions of the meetings for the entire period, which were comprehensive, contain no record of any such communications [App. 820-62, 866]. Respondent presented no evidence that any townspeople were present for any of these statements or heard them [App. 805-07, 811-12]. Although the Town Accountant was aware of the dispute, respondent left him with the impression that respondent did not view Steeves' conduct as "criminal or devious", and respondent never asked for an investigation [App. 437, 443].

The dispute between respondent and Steeves led to increased friction in the department [A. 5]. There was "constant strife" over which of the two was in control, and the department "deteriorated" into two cliques [App. 448,

674]. In late March, 1990, petitioner's public water supply evidenced unacceptable levels of contamination, requiring petitioner to notify the state environmental agency [A. 5]. Respondent, because of Steeves' familiarity with the procedure, asked Steeves to handle the notification [App. 180-81]. Although, according to respondent, Steeves agreed to do so, notification did not occur until April 10, 1990 [App. 334-35]. As late as April 6, respondent and Steeves obviously had not yet spoken to each other about whether notification had been given, and the department employee charged with taking the daily water readings testified that he was hesitant to provide information to Steeves because of his concern that doing so would anger respondent [A. 5-6; App. 326-27]. As a result of the ensuing public controversy over the crisis, Solomine was defeated in her bid for re-election by Edwards [A. 6].

In May, 1990, respondent had conversations with both Steeves and Edwards in which each stated his intention to terminate respondent's employment, Steeves stating his belief that respondent had been involved in Solomine's campaign and Edwards stating that residents had complained to him about respondent's appointment [App. 196-99; 201, 226]. When, on May 24, 1990, Lombard moved to reappoint respondent, Steeves and Edwards blocked the motion [A. 6]. On June 28, 1990, Lombard tried again, and again was blocked by Steeves and Edwards [A. 6]. Edwards then moved to terminate respondent, but withdrew the motion without explanation [A. 6]. Meanwhile, respondent had continued to complain to the Board about Steeves without success [A. 6].

On July 12, 1990, respondent's termination came up for a Board vote at a public meeting [A. 6]. Realizing he was about to be fired, respondent left the room, went to his office, picked up invoices reflecting charges by Steeves, and returned, stating "you guys already made your vote, here is all the stuff I've got" [App. 214]. Respondent testified that his purpose in doing this was "to show [the] townspeople . . . how the DPW

was run and what was really going on in the town hall" and admitted that, although the Board knew about Steeves' activities, "[t]hat doesn't mean the town knows" because "[t]he town never did" know [App. 238]. Respondent admitted that he spoke up once he learned he was going to be fired because he "wanted the townspeople to 'know what was going on'" since it had never been disclosed to them [App. 386]. The Board then formally voted, terminating respondent's employment by a 2-1 vote, Lombard voting against [A. 7].

Respondent produced evidence of invoices for a total of $406.43 in purchases by Steeves and, therefore, avoidance of approximately $20 in state sales taxes [App. 788-92]. After respondent's July 12, 1990 accusation, petitioner requested the state auditor to investigate all of its procurement practices, leading to a report which found 32 purchases totaling $2,600 by unidentified individuals over a three-year period, resulting in avoidance of $130 in taxes [App. 780-82]. At no time during the more than eleven months he was making his complaints did respondent ask any law enforcement or tax collection authorities to investigate Steeves' conduct, nor did he bring it to the attention of the media [App. 443 and generally]. None of the memoranda he generated identified Steeves or specified his conduct [App. 808-10].

The District Court granted petitioner's motion for summary judgment. The court determined the threshold issue of whether respondent's speech was on a matter of public concern, and therefore protected, by analyzing its content, form, and context as instructed by *Connick* v. *Myers*, 461 U.S. 138, 147 (1983). The court concluded that the content was not "inherently" of public concern because the malfeasance it addressed was "*de minimis*" in scope [A. 50]. Evaluating the form and context, the court found against respondent, holding that, before the Board had decided to fire him, respondent never attempted to bring Steeves' conduct to public light and spoke in pursuit of his own employment dispute with Steeves, not as a citizen [A. 50-53]. Alternatively, the court applied the

balancing test under *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). Finding that respondent and Steeves were required to have a close working relationship and that the dispute between them had "seriously disrupted" the effectiveness of the department, the court held that petitioner's interest in operating an efficient department outweighed respondent's interest in speaking [A. 57-58].

The First Circuit vacated. The court discerned "various approaches" by other circuits to the threshold "public concern" question [A. 15]. Acknowledging that respondent's motives "prominently includ[ed]" his "self-interest in preserving" his job and were "less than altruistic", the First Circuit nonetheless held that "[w]here a public employee speaks out on a topic which is clearly a legitimate matter of *inherent* concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the 'form and context' of the expression." [A. 16] [emphasis in original]. Because respondent's speech bore on "Steeves' fitness for elective office", however minimal the alleged infractions, the court held that there was no need to examine its form and context [A. 18]. With respect to the *Pickering* balancing test, the First Circuit conceded that the "various disputes between [respondent] and Steeves led to increased friction within the Department" and that petitioner had established "considerable disruption in its operations and serious deterioration in the working relations between [respondent] and Steeves" [A. 5, 21]. Finding, however, that the "strong *public* interest" in respondent's speech supplemented his own "relatively slight *personal* interest", the First Circuit held that this outweighed petitioner's interest in curtailing the speech [A. 20] [emphasis in original]. The court concluded that petitioner had not met its burden of "showing that the disruption was attributable to the exercise of respondent's . . . right to speak out on this subject", rather than to "unrelated factors: for example, to

Steeves' allegedly unauthorized interference in the Department operations." [A. 21].[3]

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT'S INSULATION OF A PUBLIC EMPLOYEE'S SPEECH, EVEN THOUGH IT WAS FOCUSED ON HIS OWN PERSONAL EMPLOYMENT DISPUTE AND HE MADE NO EFFORT TO INFORM PUBLIC DEBATE OR TO BRING WRONGDOING TO PUBLIC LIGHT, SIGNIFICANTLY EXPANDS FIRST AMENDMENT LIMITATIONS ON PUBLIC EMPLOYERS.

The First Circuit has decided that all employee speech which "bear[s] on [the supervisor's] fitness for . . . office" now qualifies for prima facie constitutional insulation regardless of its form and context and however trivial the alleged wrongdoing [A. 18]. The First Amendment's speech clause is concerned with "threats to the rights of citizens to participate in public affairs", and assures "'unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Connick* v. *Myers*, 461 U.S. 138, 145 (1983) [quoting *Roth* v. *United States*, 354 U.S. 476, 484 (1957)]. In the public employment context, therefore, this Court consistently has held that First Amendment constraints apply to an employer when an employee speaks *as a citizen* on matters of public concern, but not when, instead, he speaks as an employee about his employment grievance. *Connick*, 461 U.S. at 147; *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). Under the First Circuit's unprecedented

[3] Although the court's decision vacates an order granting summary judgment, it does not do so based on the existence of a genuine issue of material fact, and its opinion correctly assumes the absence of such issues [A. 1-24]. Both questions raised here are questions of law. *Connick*, 461 U.S. at 148 n.7 and 150 n.10. The First Circuit explicitly has rendered a final decision on the "public concern" question [A. 18-19]. It implicitly has done so as to the balancing test, rejecting as insufficient petitioner's evidence and imposing a requirement which petitioner cannot meet [A. 21]. *See infra* p. 14-15.

holding, however, the employee has satisfied the threshold "public concern" test even when his speech focuses on and is motivated by his personal employment dispute, and he makes no effort to bring wrongdoing to public light.

The teaching of this decision stands established doctrine on it head. Ironically, the core purpose of the First Amendment's speech clause recognized in *Connick* was served only by respondent's *termination*. For more than eleven months, he kept his information from the public while he battled Steeves over authority within the department. Public debate was fostered solely when respondent learned that the Board had decided to fire him. With equal irony, the element of respondent's speech which now has been clothed in public import by judicial hindsight, i.e., Steeves' avoidance of state sales taxes, never was a focus of that speech even as made to Steeves or to respondent's two other immediate supervisors. Respondent saw all of Steeves' activities, including the purchases on the department's account, as nothing more than Steeves' method of "undermining" him, and protested Steeves' practice "so we could have some accountability" [App. 236-38].

This unwarranted expansion of the First Amendment's scope in public employment carries ominous import. Any speech by an employee which relates to the competence or propriety of his supervisor's conduct necessarily "bear[s] on [the supervisor's] fitness for . . . office" and satisfies the First Circuit's novel standard.[4] [A. 18]. Protection of all such speech by employees who are *not* exercising their rights as citizens imposes new and inappropriate burdens on public employers, wanders dangerously far from fundamental principles recognized by this Court, and merits review.

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[4] Significantly, the supervisor's conduct need not be serious in nature. Acknowledging the apparently minor character of Steeves' transgressions, the First Circuit left this issue for the "Nahant electorate" [A. 18-19 n.6].

II. The First Circuit's New "Content Only" Test For Deciding The "Public Concern" Question (a) Conflicts In Principle With *Connick* v. *Myers* And (b) Conflicts Directly With The Decisions Of Nine Other Circuits.[5]

In *Connick* v. *Myers*, this Court held that "[w]hether an employee's speech addresses a matter of public concern must be determined by the *content*, *form*, and *context* of a given statement, as revealed by the whole record." 461 U.S. at 147-148 [emphasis added]. Because the focus of the *Connick* employee's questionnaire, with one exception, was "not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors", her speech was not protected. 461 U.S. at 148. *Connick* contains no suggestion that application of a single factor, "content only" test ever is appropriate. Yet the First Circuit now has held that where an employee's speech merely bears on his supervisor's fitness for office, a court may deliberately "eschew" evaluation of its form and context [A. 16, 18].

The court finds putative support for its new test because one of the questions posed by the employee in *Connick* did involve a matter of "public concern" [A. 17 n.5]. But *Connick's* protected question, asking whether assistant prosecutors felt pressured to work in political campaigns, was in context unrelated to the employee's dispute over her transfer to another section of the office, which arose from her principled concern about a resulting conflict of interest. 461 U.S. at 140-141, 149, and n.1. Moreover, her employer feared that this one question was headed to the public media. 460 U.S. at 141. The First Circuit's implied reliance on *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979) is equally misplaced [A. 17 n.5]. In *Givhan*, this Court held that an employee's private communication about racial

[5] Fairly comprised within the first question presented is the question whether a court may apply a "content only" test when the speech concerns wrongdoing which is *de minimis*.

discrimination was protected. 439 U.S. at 415-16. *Connick* reconciled *Givhan* by noting that the employee's communication was on a matter "inherently of public concern". 461 U.S. at 148 n.8. In the same sentence, however, *Connick* also clearly pointed out that Givhan's protected speech, in context, was "not tied to a personal employment dispute". *Id.* Finally, in *Rankin* v. *McPherson*, 483 U.S. 378 (1987) [A. 18 n.5], this Court expressly reviewed the employee's speech "in context"; the speech related to an attempt on the life of the President, a national news event having no relationship to her employment; and she was involved in no ongoing personal employment dispute. 483 U.S. at 385, 386, 379-82. This Court's decisions therefore give no indication that a federal court may ever "eschew" the factors of form and context.[6]

Contrary to the First Circuit, nine other circuits have held with varying articulations that, even when the content of an employee's speech involves matters "inherently" of public concern, the court still must analyze its form and context. In *Hubbard* v. *Environmental Protection Agency*, 949 F.2d 453, 456-57 (D.C. Cir. 1991), the District of Columbia Circuit held that speech alleging the use of illegal substances by members of Congress was protected because the context showed that there was no ongoing employment dispute and the employee's motivation was not "personal". In *Czurlanis* v. *Albanese*, 721 F.2d 98, 99-101, 104-05 (3rd Cir. 1983), the Third Circuit held that an employee's speech about "inefficient, wasteful, and possibly fraudulent" practices was protected because he addressed a board who were not his immediate supervisors; it did not arise from a personal employment dispute; and he spoke during the part of the board's session "when citizens are invited to address the Board".[7] In

[6] In *Pickering* v. *Board of Education*, which antedated *Connick's* formulation, the form and context of the protected speech (a letter to a newspaper in the absence of any ongoing personal employment dispute) show that it would have met the *Connick* test. 391 U.S. at 565-67.

[7] *See also O'Donnell* v. *Yanchulis*, 875 F.2d 1059, 1061 and n.2 (3rd Cir. 1989) (analyzing speech about legal improprieties and abuse of position).

Seemuller v. *Fairfax County School Board*, 878 F.2d 1578, 1581-83 (4th Cir. 1989), the Fourth Circuit held that speech about sex discrimination met *Connick's* three-factor test because it was published in a newspaper in the context of community concern about the issue. *Brawner* v. *City of Richardson*, 855 F.2d 187, 191 (5th Cir. 1988) involved speech about possible police misconduct. The Fifth Circuit held that the "content, form and context" showed that the employee was speaking "as a citizen", because his speech consisted of a letter to the mayor, city council, and local newspaper reporters, and the context was "a continuing commentary that had originated in the public forum of the newspaper." 855 F.2d at 191. In *Marohnic* v. *Walker*, 800 F.2d 613, 614, 616 (6th Cir. 1986) (per curiam), the Sixth Circuit held that speech about fraudulent billing by a public board was protected because its context and form showed that it consisted of statements made to state investigators, it was "induced by civic commitment", and there was no ongoing personal employment dispute. *Callaway* v. *Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987) involved speech about incidences of sexual harassment, "inherently matters of public concern." Nonetheless, the Seventh Circuit held that the speech was not protected because the form and context established that the employee was not speaking as a citizen, but, instead, in pursuit of her own employment grievance. *Id.*[8] In *Roth* v. *Veteran's Administration*, 856 F.2d 1401, 1405-06 (9th Cir. 1988), the Ninth Circuit held that speech about waste of resources, unethical practices, and violations of safety regulations was protected because the context "involved no personal employment dispute" and showed that the employee "spoke out . . . for the good of the institution, the Veterans it serves, and the public".[9] In

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[8] *See also Barkoo* v. *Melby*, 901 F.2d 613, 618-19 and n.4 (7th Cir. 1990) (analyzing speech about unlawful taping of conversations); *Breuer* v. *Hart*, 909 F.2d 1035, 1038 (7th Cir. 1990) (analyzing speech about theft of public property).

[9] *See also Hyland* v. *Wonder*, 972 F.2d 1129, 1137-38 (9th Cir. 1992) *cert. denied* 113 S.Ct. 2337 (1993) (analyzing speech about abuses, inefficiency, threats to public safety, and civil rights violations).

Schalk v. *Gallemore*, 906 F.2d 491, 495-96 (10th Cir. 1990), the Tenth Circuit held that speech about "waste and wrongdoing" was protected because it "was not made in the context of an ongoing personal employment grievance", the employee was not addressing her supervisor, and she was "motivated out of her concern as a taxpayer and citizen", not by "displeasure with her position."[10] Finally, in *Bryson* v. *City of Waycross*, 888 F.2d 1562, 1565-66 (11th Cir. 1989), the Eleventh Circuit held that the speech satisfied *Connick's* three-part test because the speaker "attempt[ed] to expose" police corruption by bringing it to the attention of officials other than his immediate supervisors.

Application of these cases would have mandated a holding that respondent's speech was not on a matter of public concern.[11] Courts in the First Circuit therefore must apply a standard in conflict with those used in the District of Columbia, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, and review by this Court is warranted.[12,13]

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[10] *See also Patrick* v. *Miller*, 953 F.2d 1240, 1247-48 (10th Cir. 1992) (analyzing speech about racial discrimination and misuse of funds); *Considine* v. *Board of County Commissioners*, 910 F.2d 695, 699-700 (10th Cir. 1990) (analyzing speech about health and safety violations); *Koch* v. *City of Hutchinson*, 847 F.2d 1436, 1446-47 and n.17 (10th Cir. 1988) (en banc) *cert. denied* 488 U.S. 909 (1988) (analyzing speech about failure to discharge duty to investigate fires) (collecting cases where the employee "sought to disclose wrongdoing").

[11] Implicit in the First Circuit's apparent felt need to create a new single factor standard is the concession that respondent's speech fails the three-part test under *Connick*.

[12] Curiously, the First Circuit cited *Brawner*, *Breuer*, and *Patrick*, apparently in support of its "content-only" analysis [A. 19 n.6].

[13] It does not appear that the Second Circuit or the Eighth Circuit expressly have decided this question. *But see Rookard* v. *Health and Hospitals Corporation*, 710 F.2d 41, 46 (2d Cir. 1983); *Hamer* v. *Brown*, 831 F.2d 1398, 1402 (8th Cir. 1987).

III. THE FIRST CIRCUIT HAS IMPOSED A NEW AND UNREASONABLE STANDARD ON PUBLIC EMPLOYERS UNDER THE *PICKERING* BALANCING TEST BY REQUIRING PROOF OF MORE THAN ACTUAL AND TOTAL IMPAIRMENT OF THE CLOSE WORKING RELATIONSHIP BETWEEN THE EMPLOYEE AND THE SUPERVISOR HE REPEATEDLY CONFRONTED.

The undisputed facts established that respondent, by his own testimony, confronted Steeves on "hundreds" of occasions and "stood in [Steeves'] way" as to the purchases [App. 606, 563]; that their relationship became one of "constant strife" [App. 448]; that the public water crisis was exacerbated by Steeves' and respondent's failure to speak with each other about notification of the proper authorities [A. 6]; that one key department employee was hesitant to speak to Steeves about this matter because of his concern that respondent would be angry [A. 5-6]; that respondent spoke to another employee about Steeves' "interference" [App. 764]; that Steeves and respondent occupied a close working relationship [App. 286-87], such that respondent had to rely on Steeves to handle the notification procedure [App. 180-81]; that respondent's relationship with the Board became openly hostile [App. 416]; and that respondent viewed and addressed *all* of Steeves' acts, including the purchases, as merely different ways of "undermining" him [App. 234]. The First Circuit did not find any of these facts to be disputed; conceded respondent's "less than altruistic" motives in speaking; and agreed that petitioner had shown "considerable disruption" in the department's operations and "serious deterioration" in the working relationship between Steeves and respondent [A. 20-21]. Because, however, petitioner had not shown that these problems were caused *specifically* by respondent's speech about the purchases (although that speech was inextricably tied to his other complaints about Steeves), the First Circuit decided the *Pickering* balancing test against petitioner [A. 21].

This unrealistic burden of proof significantly expands prior law and makes vindication of its interest in an efficient workplace virtually impossible for a public employer whose operations have nonetheless been disrupted to the point of a public health crisis. In *Connick*, this Court resolved the balancing test in favor of an employer where he "reasonably believed" the speech "would disrupt the office, undermine his authority, and destroy close working relationships." 461 U.S. at 154. Finding that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate", this Court stated that the lower court imposed "an unduly onerous burden" on the employer by requiring a showing that the employee's speech caused actual interference with official duties. 461 U.S. at 149-50, 151. While *Connick* cautioned that "a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern", 461 U.S. at 152, it gave no indication that proof of repeated confrontation, followed by actual disruption of the working relationship, is insufficient without the additional and arbitrary isolation of the *protected* speech as the cause. This heightened proof requirement is particularly inappropriate where the employee chooses *not* to make the speech in his role as a citizen but instead as an inseparable part of, and in furtherance of, his own employment dispute. *See supra* at 10-13. *See also Koch*, 847 F.2d at 1451-52; *Kinsey* v. *Salado Independent School District*, 950 F.2d 988, 996 (5th Cir. 1992) (en banc) *cert. denied* 112 S.Ct. 2275 (1992); *Hesse* v. *Board of Education*, 848 F.2d 748, 753 (7th Cir. 1988) *cert. denied* 489 U.S. 1015 (1989). The First Circuit's articulation of a new and unreasonable burden of proof for public employers merits review by this Court.

CONCLUSION

For these various reasons, petitioner respectfully requests that the petition be granted or, in the alternative, that this Court summarily reverse.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2134

PATRICK J. O'CONNOR,
PLAINTIFF, APPELLANT,
v.
ROBERT W. STEEVES, ET AL.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Mark L. Wolf, *U.S. District Judge*]

ARGUED FEBRUARY 1, 1993 - DECIDED MAY 28, 1993

Before SELYA and CYR, *Circuit Judges*, and ALDRICH, *Senior Circuit Judge*

CYR, *Circuit Judge*. Patrick O'Connor, former Superintendent of Public Works for the Town of Nahant, Massachusetts ("Town"), was discharged following an extended feud with Selectman Robert Steeves. O'Connor sued the Town and its three selectmen — Steeves, Harry Edwards and Richard Lombard — for violating his First Amendment rights to freedom of speech and political association. The district court granted summary judgment for all defendants.

I

BACKGROUND

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to

judgment as a matter of law, Fed. R. Civ. P. 56(c); *Mesnick* v. *General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991), *cert. denied*, 112 S.Ct. 2965 (1992). All reasonable inferences are to be drawn in favor of the party opposing summary judgment, in this case appellant O'Connor, just as all disputed facts are viewed in the light most favorable to him. *See Goldman* v. *First Nat'l Bank*, 985 F.2d 1113, 1116 (1st Cir. 1993); *Garside* v. *Osco Drug, Inc.*, 895 F.2d 46, 48 (1st Cir. 1990). On the other hand, we will not credit "conclusory allegations, improbable inferences, and unsupported speculation." *Medina-Munoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

A. *The Town*

Nahant, Massachusetts, is a municipality of approximately 4,200 people, located north of Boston. Under the Town Charter, a three-member Board of Selectmen serves as the "chief policy-making agency of the town." Selectmen serve staggered three-year terms; one seat on the Board is filled by election each year.

Among their other duties, the Selectmen are charged with appointing a Superintendent of Public Works (hereinafter "Superintendent"), whose duties are defined in the Town Charter:

> He shall administer, under the supervision and direction of the Selectmen, a Department of Public Works and the highway, water, sewer, cemetery, tree warden and health departments. He shall also administer, under the supervision and direction of the Selectmen, such other departments under their supervision as the Selectmen may designate, except the fire and police. He shall be responsible for the administration of all departments within the scope of his duty, and shall hold office subject to the will of the Selectmen. He shall be specially fitted by education, training and experience to perform the

> duties of said office. . . . During his tenure, he shall hold no other elective or appointive office, nor shall be engaged in any other business or occupation. . . . and shall, subject to the approval of the Selectmen, appoint such assistants, agents and employees as the performance of the duties of the various departments under his supervision may require.

The job description for the position notes that it is "performed with professional independence and considerable latitude for independent administrative judgment" and that "[e]rrors could result in major loss of time and expenses." It also notes that the Superintendent "makes frequent contacts with other officials and the general public." Commensurate with these responsibilities, the Superintendent receives a salary of $41,286; by comparison, the Nahant Public Chief and Nahant Fire Chief each receive $41,365, and the Nahant Superintendent of Schools receives $48,000. Lower level salaries in the Department of Public Works ["Department"] range from $20,000-$24,000 for laborers to $31,000-$35,000 for foremen.

B. *O'Connor's Appointment*

Prior to 1989, Robert Steeves served as Superintendent. The Town's three Selectmen at the time were Jayne Solomine, Richard Lombard, and Charles Kelley. In February 1989, following Kelley's death, Steeves was elected to the Board of Selectmen, triggering a search for a replacement Superintendent. The position was advertised as requiring "an associate degree in civil engineering or five years experience in related engineering fields."

Although O'Connor had no engineering degree, he submitted an application for the position. O'Connor had worked in construction prior to 1963; then as a foreman in a local manufacturing plant; then, following his retirement, in various positions for the Rynn Corporation, a family-owned construction company. More to the present point, perhaps,

O'Connor had been active in the Solomine, Kelley, and Lombard election campaigns, having headed Solomine's initial campaign for public office in 1983. On July 20, 1989, O'Connor was appointed Superintendent, by a 2-1 vote, with Lombard and Solomine voting in favor. Steeves voted against the appointment, stating that O'Connor was unqualified and had been appointed because of his connections to the Lombard and Solomine election campaigns.

C. *Steeves and O'Connor*

Notwithstanding O'Connor's appointment as Superintendent, Steeves continued his hands-on involvement in the Department, dealing with vendors, directing personnel, and making various small purchases on the Department's account. O'Connor believed that Steeves' continuing involvement "undermined" O'Connor's authority within the Department, and on several occasions in late 1989 O'Connor told Steeves he should stay "out of doing my job." At around the same time, O'Connor became aware of Steeves' practice of purchasing goods for personal use through the Department account, which was not subject to the 5% Massachusetts sales tax. Although Steeves later repaid the Department for these purchases, the record does not indicate that the sales tax was ever paid. After discussing the matter with Town Accountant Joseph Canty, O'Connor concluded that the practice was improper, and asked Steeves to stop "so we could have some accountability through the financial system and all these invoices and everything else." Steeves did not respond.

When his approaches to Steeves proved unsuccessful, O'Connor complained to Selectmen Lombard and Solomine about Steeves' conduct, including the improper use of the Department account. In January or February 1990, O'Connor wrote the Board, detailing his complaints about Steeves' purchasing practices. The letter was discussed at a "public meeting" of some kind, although O'Connor is not sure whether any members of the public were in attendance.

Selectman Lombard told Steeves to stop using the Department account, and wrote all department heads directing them to instruct employees not to charge purchases on department accounts without authorization. In response to Lombard's letter, O'Connor drafted an internal memorandum prohibiting unauthorized purchases on the Department account. The memorandum had little noticeable effect. Steeves continued to charge personal purchases on the Department account.

In March 1990, O'Connor addressed another memorandum to the Board, again describing Steeves' personal use of the Department account, and requesting that these practices be stopped. Lombard read the memorandum at another Board meeting and issued Steeves another warning, but apparently Steeves did not terminate the practice. The various disputes between O'Connor and Steeves led to increased friction within the Department. By the spring of 1990, as all parties concede, the Department's employees had divided into two factions, which communicated poorly, apparently on unfriendly terms.

2. *The Town Water Crisis*

In late March 1990, shortly before the annual Town election, larger events temporarily distracted the parties from the dispute over Steeves' purchasing practices, and caused them to focus instead on the breakdown of communications within the Department. Three consecutive readings of the Town water supply revealed bacterial contamination; under Massachusetts law, the Department was required to notify the public and the Massachusetts Department of Environmental Protection ("DEP"), and to take steps to safeguard the Town water supply. O'Connor was notified of the contamination during a family emergency, and called on Steeves to take charge of notifying the DEP. Steeves later insisted that he promised O'Connor no specific assistance. Phillip Applin, a Department employee, testified that although he provided information to Steeves at O'Connor's direction, he did so with hesitation, "because Mr. Steeves was not supposed to be in-

volved with bothering the Public Works employees." Applin also testified that, as late as April 6, 1990, O'Connor and Steeves obviously had not yet spoken to each other about whether the DEP had been notified. Apparently as a result of the breakdown in communications between the parties, neither DEP nor the Town was notified about the contamination for several days, and a number of Town residents became seriously ill.

The perceived mishandling of the water contamination problem generated considerable public controversy, and became an important factor in the April, 1990 elections. Selectman Jayne Solomine, who supported O'Connor, was replaced by Harry Edwards, a Steeves supporter. Edwards later stated that he had been approached, prior to the election, by voters concerned about O'Connor's performance during the Town water crisis, and that he viewed his election as a mandate to remove O'Connor as Superintendent.

D. *O'Connor's Termination*

Following Edwards' election and the correction of the water contamination problem, O'Connor resumed his complaints about Steeves' unauthorized purchasing practices. In May or June, O'Connor presented the Board with another invoice for a personal purchase by Steeves on the Department account. O'Connor also approached Edwards, the new Selectman, seeking to discuss Steeves' misuse of Department accounts. Edwards appeared uninterested.

At a Board meeting on May 24, 1990, Lombard moved to reappoint O'Connor as Superintendent; Edwards and Steeves blocked the motion. On June 28, 1990, Lombard again moved to reappoint O'Connor, but once again Edwards and Steeves blocked the reappointment. Edwards then moved to terminate O'Connor, but withdrew the motion without explanation. On July 12, 1990, O'Connor's termination again came up for a Board vote. Just before the vote, O'Connor left the meeting, went to his office, and returned with a number of

Department invoices signed by Steeves, then proceeded to describe Steeves' improper conduct to those in attendance, stating that he wanted the townspeople to know "what was really going on in the city hall."[1]

Lombard voted against O'Connor's termination; Edwards and Steeves voted in favor. Edwards later said he voted to terminate O'Connor because of the "mandate" he had been given by voters after the Town water crisis. Steeves later stated that he voted to terminate O'Connor because of O'Connor's alleged involvement in Solomine's unsuccessful reelection bid, and because O'Connor allegedly had told a Department employee not to vote for Edwards during the April 1990 elections, which O'Connor denies. In August, 1990, O'Connor sued, alleging, *inter alia*, that he had been discharged in retaliation for his political affiliation with Solomine, and for his accusations against Steeves.[2]

II

DISCUSSION

A. *Political Discharge*

A public employee may not be discharged, demoted, or disciplined for political activities or beliefs, unless political affiliation or belief is an appropriate job qualification for the

[1] O'Connor apparently succeeded in piquing public interest about Steeves' purchasing practices. Following O'Connor's termination, the Essex County District Attorney requested "an audit of the Town's procurement policies, practices and procedures." The State Auditor ultimately identified 32 purchases of goods — totalling approximately $2600 — by individuals for their own use. The audit noted that "the practice of allowing individuals to purchase items through the town is improper, if not illegal, and holds the town at risk of paying for any purchases that are not identified as personal purchases." The audit did not identify the individuals responsible for these improper purchases.

[2] The district court dismissed O'Connor's various other claims under federal and state law on the merits. O'Connor does not challenge those dismissals.

particular position. *See Rutan* v. *Republican Party of Illinois*, 497 U.S. 62 (1990); *Branti* v. *Finkel*, 445 U.S. 507 (1980); *Elrod* v. *Burns*, 427 U.S. 347 (1976). Assuming, without deciding, that political affiliation was a "motivating factor" for O'Connor's discharge, *see Mt. Healthy City School Dist. Bd. of Education* v. *Doyle*, 429 U.S. 274, 287 (1977); *see also Acosta-Sepulveda* v. *Hernandez-Purcell*, 889 F.2d 9, 12-13 (1st Cir. 1989); *Rosado* v. *Zayas*, 813 F.2d 1263 (1st Cir. 1987), we affirm the grant of summary judgment against O'Connor, since we conclude that political affiliation was an appropriate requirement for the Superintendent position.

Although "[t]he difficulties in determining whether a government employee is protected from a politically motivated discharge are considerable," *Agosto-de-Feliciano* v. *Aponte-Roque*, 889 F.2d 1209, 1214 (1st Cir. 1989) (en banc), the test we apply is familiar. First, we inquire whether the overall *functions* of the employee's department or agency involve "decision making on issues where there is room for political disagreement on goals or their implementation," *Jimenez Fuentes* v. *Torres Gaztambide*, 807 F.2d 236, 241-42 (1st Cir. 1986) (en banc), *cert. denied*, 481 U.S. 1014 (1987); *see also Rodriguez-Burgos* v. *Electric Energy Auth.*, 853 F.2d 31, 35 (1st Cir. 1988); *Goyco de Maldonado* v. *Rivera*, 849 F.2d 683, 684-85 (1st Cir. 1988). Second, we decide whether the *particular responsibilities* of the plaintiff's position, within the department or agency, resemble those of "a policy-maker, privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement" for continued tenure. *Jimenez Fuentes*, 807 F.2d at 242. Among the indicia material to the second element are "'relative pay, technical competence, power to control others, authority to speak in the name of policy-makers, public perception, influence on programs, contact with elected officials, and responsiveness to partisan politics and political leaders.'" *Id.* (quoting *Ecker* v. *Cohalan*, 542 F.Supp. 896, 901 (E.D.N.Y. 1982)); *see also Mendez-Palou* v. *Rohena-Betancourt*, 813 F.2d 1255, 1258-59 (1st

Cir. 1987); *see generally Stott* v. *Martin*, 783 F.Supp. 970, 976-82 (E.D.N.C. 1992) (collecting First Circuit case law following *Jimenez Fuentes*).

The summary judgment record establishes beyod peradventure that the Department "handled matters potentially subject to partisan political differences," *Mendez-Palou*, 813 F.2d at 1258, not unlike governmental departments in larger municipalities. *See Tomczak* v. *City of Chicago*, 765 F.2d 633, 641 (7th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985) (cautioning against "unduly myopic view" of "the role of politics in the seemingly apolitical context of universal provision of services").

> The primary function of any local government entity is the provision of services such as police and fire protection, public schools, hospitals, transportation, and libraries, as well as quasi-utility functions such as water, garbage, and sewage services. Elections often turn on the success or failure of the incumbent to provide these services, and, as campaigns develop, the opposing sides put forth varying proposals about how best to provide services. While the ultimate goal of all sides might be the same, there is clearly room for principled disagreement in the development and implementation of plans to achieve that goal.

Id. Here, the Department's role in the life of the Town plainly parallels the Water Department's role in *Tomczak*, which repeatedly has been cited in this circuit as a benchmark for evaluating the political responsibilities of public employment. *See, e.g., Collazo Rivera* v. *Torres Gaztambide*, 812 F.2d 258, 260 (1st Cir. 1987) (finding administration of agrarian reform programs, by Puerto Rico's Regional Housing Administration, "at least as important to partisan political goals as the provision of water discussed in *Tomczak*"); *see also Cordero* v. *De Jesus-Mendez*, 867 F.2d 1, 15 (1st Cir. 1989) (finding "no evidence of comparable responsibility" between Water Director's

position in *Tomczak* and plaintiff's position as Administrative Aide to the Assistant Director of Public Works in Town of Moca, Puerto Rico); *Roman Melendez* v. *Inclan*, 826 F.2d 130, 133 (1st Cir. 1987) (finding duties of Regional Manager in Puerto Rico's General Services Administration "analogous, in general character," to that of Water Director in *Tomczak*).[3] It also offers clear confirmation of *Tomczak's* continuing validity: by all accounts, as the district court pointed out,

[3] Like the Water Department in *Tomczak*, the Department performed "quasi-utility functions" for virtually all community residents, and, therefore, was capable of attracting significant public attention in the context of a local election campaign. The same can be said, of course, about many other public and municipal agencies and departments. Thus, for example, we have held this first prong of the *Jimenez Fuentes* test to have been met by the position of Regional Director of the Puerto Rico General Services Administration, insofar as that agency was responsible for determining "the degree of attention [to be given] the physical conditions of public buildings . . . which buildings need immediate or special care, . . . whether to give priorities to rural or urban schools," *Roman Melendez*, 826 F.2d at 134; the Puerto Rico Department of Natural Resources, which "formulates and implements public policies that potentially implicate partisan interests," *Monge-Vazquez* v. *Rohena-Betancourt*, 813 F.2d 22, 26 (1st Cir. 1987); *accord Navas Chabran* v. *Santiago Nieves*, 666 F.Supp. 16, 18 (D.P.R. 1987); and the Puerto Rico Urban Development and Housing Corporation, which participates in "the provision of housing to low and middle income city residents . . . a vital political issue," *Jimenez Fuentes*, 807 F.2d at 241-44.

O'Connor challenges any analogy to *Tomczak*, asserting that "the duties, size of staff and budget of the First Deputy Commissioner of the Water Department of Chicago . . . differ materially" from those of the Nahant Superintendent. It is true, of course, that the $40 million operating budget and 1,150 employees controlled by the Water Department in *Tomczak* greatly exceed O'Connor's $60,000 departmental budget and fifteen person staff. But we think O'Connor's direct comparison, based exclusively on departmental size and budget, overlooks the equally dramatic differences in the populations and municipal budgets of Chicago and Nahant. Chicago's population is approximately 2.8 million; Nahant's approximately 4,200. Chicago's annual budget is approximately $3.2 billion; Nahant's approximately $4 million. We do not think governmental provision of essential public services is any the less prone to politicization in smaller communities; municipal services are as essential to the few as to the many. In light of the broader scope of the public services it provides, we think the role of the Department in the political life of Nahant is *at least* comparable to that of the Water Department in Chicago. *Cf. Cordero*, 867 F.2d at 15.

the 1990 elections for Town Selectman turned in large part on the Department's failure to assure safe drinking water to Town residents.

Moreover, whatever difficulties we might face in applying the second prong of the *Jimenez Fuentes* test to subordinate positions within the Department, *see, e.g., Cordero*, 867 F.2d at 14-15 (finding political affiliation inappropriate job requirement for *assistant* director of public works), the Superintendent's "inherent responsibilities" under the Town Charter, as the person "responsible for the administration of all departments within the scope of his duty," plainly "'had a bearing on the partisan goals and policies'" of the Department as a whole. *Rodriguez-Burgos*, 853 F.2d at 35 (quoting *Mendez-Palou*, 813 F.2d at 1263). O'Connor protests that, in practice, his position involved little managerial responsibility, and he was in fact "essentially a working foreman." As we have held, however, "the *actual* past duties of the discharged employee are irrelevant if the position *inherently* encompasses more expansive powers and more important functions that would tend to make political affiliation an appropriate requirement for effective performance." *Mendez-Palou*, 813 F.2d at 1258 (emphasis added). Accordingly, absent ambiguity in the official job description, the analysis must focus upon the "powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office." *Jimenez Fuentes*, 807 F.2d at 242; *see also, e.g., Batistini* v. *Aquino*, 890 F.2d 535 (1st Cir. 1989); *Mendez-Palou*, 813 F.2d at 1258; *cf. Stott*, 783 F.Supp. at 976 n.6 (noting that the *Jimenez Fuentes* court "did review plaintiffs' testimony about their actual duties," and concluding that "such testimony may be useful in filling gaps left by the official job description and in amplifying the responsibilities listed in the description . . . [though not] to belittle the job into one with less significant responsibilities").

The district court carefully, and in great detail, analyzed the job description for the position of Superintendent, and its

unchallenged findings — that seventeen of twenty-three listed duties are "policy-making," "representative," or "personnel" functions — comport with our "common sense judgment" on the matter. *See Jimenez Fuentes*, 807 F.2d at 242. As the district court correctly determined that O'Connor's political affiliation was an appropriate criterion for the position that he held, we affirm its grant of summary judgment on the political discharge claim.

B. *"Whistleblowing" Claim*

O'Connor's alternative claim presents a closer question. Essentially, O'Connor contends that he was discharged because he disclosed Steeves' unauthorized use of the Department account; that these disclosures dealt with a matter of significant public concern; and that his First Amendment right to speak out on the subject — against the interests of Steeves, his elected superior — outweighed the Town's demonstrated interest in protecting Department operations from any resulting disruptions and inefficiencies. We agree, and since we are unable to conclude, on the present record, that O'Connor's discharge *could not* have resulted from his protected speech (as opposed to his unprotected speech, or his job performance as Superintendent), we must vacate the grant of summary judgment for the Town and remand to the district court for further proceedings.

1. *Legal Standard and Standard of Review*

A government employee retains the First Amendment right to speak out, as a citizen, on matters of public concern, so long as the employee's speech does not unduly impede the government's interest, as employer, in the efficient performance of the public service it delivers through its employees. *Pickering* v. *Board of Educ.*, 391 U.S. 563, 568 (1968); *see also Rankin* v. *McPherson*, 483 U.S. 378 (1987); *Connick* v. *Myers*, 461 U.S. 138 (1983); *Brasslett* v. *Cota*, 761 F.2d 827

(1st Cir. 1985). Three tests determine whether the court is presented with an actionable claim for the infringement of a public employee's First Amendment rights.

First, the court must determine, on the basis of "the content, form, and context of a given statement, as revealed by the whole record," whether the employee was speaking "as a citizen upon matter of public concern," or, alternatively, "as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147-48. If an employee's speech "cannot be fairly characterized as constituting speech on a matter of public concern," then its First Amendment value is low and "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision" arising therefrom. *Id.* at 146-47.

Second, if the employee did speak out on a matter of public concern, the court must balance the strength of the employee's First Amendment interest, and any parallel public interest in the information which the employee sought to impart, against the strength of the countervailing governmental interest in promoting efficient performance of the public service the government agency or entity must provide through its employees. *Pickering*, 391 U.S. at 568; *Brasslett*, 761 F.2d at 839. Though often imprecise,

> [t]his balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because

> superiors disagree with the content of employees' speech.

Rankin, 483 U.S. at 384 (citations omitted; emphasis in original). As the *Connick* and *Pickering* determinations depend on whether the employee statements "are of a character which the principles of the First Amendment . . . protect," *Connick*, 461 U.S. at 150 n.10, these determinations are always subject to *de novo* review. *Id.; see also Rankin*, 483 U.S. at 385-86; *Brasslett*, 761 F.2d at 835; *see generally Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) ("in cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free speech'") (citations omitted).

Third, and finally, if the court determines that the public employee's First Amendment interests in speaking out outweigh a legitimate governmental interest in curbing the employee speech, the plaintiff-employee must show that the protected expression was a substantial or motivating factor in the adverse employment decision; and, if the plaintiff meets this test, the defendant governmental entity must be afforded an opportunity to show "by a preponderance of the evidence that [it] would have reached the same decision . . . even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287; *see also Duffy* v. *Sarault*, 892 F.2d 139 (1st Cir. 1989). This third test implicates questions of fact; "clear error" review is appropriate where judgment was entered after a trial on the merits, *see Duffy*, 892 F.2d at 144-45, whereas plenary review applies at the summary judgment stage. *See Mesnick*, 950 F.2d at 822.

2. *Threshold Inquiry: "Matters of Public Concern"*

The courts of appeals have adopted various approaches for determining whether a topic of employee speech is of "public concern," under the "threshold inquiry" required by *Connick*, 461 U.S. at 146. *See, e.g.*, D. Gordon Smith, Note, *"Beyond Public Concern: New Free Speech Standards for Public Employees,"* 57 U.Chi. L. Rev. 249, 258-61 (1990) (surveying case law). Some courts have adopted a content-based analysis, focusing exclusively on "'which information is needed or appropriate to enable the members of society' to make informed decisions about the operation of their government," *McKinley* v. *City of Eloy*, 705 F.2d 1110, 1113-14 (9th Cir. 1983) (quoting *Thornhill* v. *Alabama*, 310 U.S. 88, 102 (1946)), in effect providing *per se* protection to public-employee speech on certain topics of "inherent" public interest, such as official malfeasance or abuse of office. *See Koch* v. *City of Hutchinson*, 847 F.2d 1436, 1446 n.17 (10th Cir.) (en banc), *cert. denied*, 488 U.S. 909 (1988). Other courts have adopted an analysis which turns either entirely or in part on the employee's subjective intent, *i.e.*, on whether the employee's speech *"was calculated* to disclose misconduct" or to inspire public debate on some issue of significant public interest. *Conaway* v. *Smith*, 853 F.2d 789, 796 (10th Cir. 1988) (emphasis in original); *see also Callaway* v. *Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987) ("while the content of [plaintiff's] communications touched upon an issue of public concern generally . . . such speech stands unprotected from employer scrutiny when uttered in the pursuit of purely private interests"); *Terrell* v. *University of Texas System Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987) ("the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment"); *Linhart* v. *Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) *(Connick* "requires us to look at the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise

other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?")[4]

As our own case law implicitly recognizes, the circumstances of a particular case may govern the appropriate approach under *Connick*. Where a public employee speaks out on a topic which is clearly a legitimate matter of *inherent* concern to the electorate, the court may eschew further inquiry into the employee's motives as revealed by the "form and context" of the expression. *See, e.g., Brasslett*, 761 F.2d at 844 n.14 (according no apparent consideration to public employee's personal motive, where fire chief's public commentary on available fire protection, and on Town Council's actions in dealing with associated problems, plainly qualified as matters of inherent "public concern"). On the other hand, public-employee speech on a topic which would not necessarily qualify, *on the basis of its content alone*, as a matter of inherent public concen (e.g., internal working conditions, affecting only the speaker and co-workers), may require a more complete *Connick* analysis into the form and context of the public-employee expression, "as revealed by the whole record," *Connick*, 461 U.S. at 146, with a view to whether the community has *in fact* manifested a legitimate concern in the internal workings of the particular agency or department of government, and, if so, whether the "form" of the

[4] We identify these approaches, somewhat inexactly, as the "contextual" and "content-based" approaches to *Connick's* threshold test for determining the level of First Amendment speech protection. Under the "content-based" approach, the objective content of an employee's statement is determinative, and the "form and context" of the statement are examined only in close cases, to determine whether the *content* of the statement is of "public concern." Under the "contractual" approach, the three factors are considered *seriatim*. A determination that the *content* of the expression addresses a "matter of public concern," while often described as "the greatest single factor in the *Connick* inquiry," *Breuer* v. *Hart*, 909 F.2d 1035, 1039 (7th Cir. 1990) (quoting *Belk* v. *Town of Minocqua*, 858 F.2d 1258, 1264 (7th Cir. 1988)), does not end the inquiry; in certain circumstances the employee may still be disciplined if the "form and context" of the speech indicate that the employee was driven by purely personal concerns.

employee's expression suggests a subjective intent to contribute to any such public discourse. *See, e.g., Alinovi* v. *Worcester School Committee*, 777 F.2d 776, 787 (1st Cir. 1985), *cert. denied*, 479 U.S. 816 (1986) (letters of reprimand issued to teacher by school administration did not implicate an issue of "public concern" under *Connick*, despite tangential connection to an incident implicating the teacher's Fourth Amendment rights; "when [the teacher] posted the letters . . . she was not *concerned with* any possible violation of her Fourth Amendment rights, but rather, with [a] purely personal issue concerning the lack of action on the part of the administration regarding her disciplinary problem") (emphasis added). Since "almost anything that occurs within a public agency *could* be of concern to the public," *Terrell*, 792 F.2d at 1362 (emphasis in original), a full-fledged "form and context" analysis is appropriate in these instances. "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — and certainly every criticism directed at a public official — would plant the seed of a constitutional case". *See Connick*, 461 U.S. at 149.[5]

[5] The circumstances presented in *Connick* itself required both forms of analysis. There, an assistant district attorney, opposing her transfer to another department, circulated a questionnaire "concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." 461 U.S. at 141. Analyzing the "content, form and context" of the employee's statements, the Supreme Court noted that the employee "did not seek to inform the public that the District Attorney's office was not discharging its governmental responsibilities . . . [or] seek to bring to light actual or potential wrongdoing or breach of trust on the part of [public officials]." *Id.* at 148. However, it held, that *the content of one question did touch upon a "matter of interest to the community," i.e.*, whether assistant district attorneys were pressured to work in political campaigns. The Court then proceeded to evaluate that question separately, under the second "balancing" step in the *Pickering* analysis. *See id.* at 149-154. The separate treatment given the one item of "inherent public concern" on the employee questionnaire is consistent with our exempting such clear First Amendment speech from the full-scale threshold inquiry into the employee's motives in speaking, undertaken in *Connick* in relation to the other items on the

In our own case, O'Connor's allegations were not limited to internal personnel procedures, affecting only himself and other Department employees. Rather, O'Connor's revelations directly implicated a topic of inherent concern to the community — official misconduct by an incumbent elected official. Given their direct bearing on Steeves' fitness for elective office, we think O'Connor's allegations of improper purchases clearly constituted a matter of legitimate public concern, obviating the need for a threshold analysis of his dominant motive for speaking out on these issues.[6] Accordingly, we

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questionnaire. *See Zamboni* v. *Stamler*, 847 F.2d 73, 78 (3d Cir.) ("[w]ere motivation rather than content dispositive [in *Connick*], the Court would have had no reason to isolate the one question that was of public concern"), *cert. denied*, 488 U.S. 899 (1988).

Rankin v. *McPherson*, *supra*, is the only other Supreme Court case to consider, in depth, the application of *Connick's* threshold test. *Rankin* concerned a law enforcement employee's private comment to a co-worker, in the aftermath of the assassination attempt against President Reagan: "if they go for him again, I hope they get him." 483 U.S. at 381. The Court found that the statement, *in context*, "plainly dealt with a matter of public concern," insofar as it "came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President." *Id.* at 386 (emphasis added). The Court paid little attention to the "form and context" of McPherson's statement, insofar as those factors bore on her *motives* for speaking; indeed, if the Court had done so, it probably would have found that the statement (which apparently occurred without premeditation, in a private conversation between co-workers) was motivated by little or no civic concern to inform the public on any relevant issue. *Rankin* suggests that the courts are to proceed to the second-stage *Pickering* inquiry whenever public-employee speech, objectively viewed in the context of a broader public discourse, addresses (with reasonable specificity) an *issue* or *topic* implicating "core" First Amendment concerns.

[6] The district court noted that the summary judgment record included only five Department invoices signed by Steeves during the entire period in question, representing cumulative personal purchases amounting to approximately $500, on which a total state sales tax approximating $20-25 would have been due. Based on these small sums, and the fact that Steeves repaid the monies expended by the Department, the district court considered Steeves' alleged misconduct *de minimis*. Given their bearing on Steeves' fitness for elective office, these improper purchases clearly pertained to a matter of legitimate public interest to the community. If their infrequency, modest amount, and repayment tempered their seriousness as a

reject the Town's contentions, based on the "form and context" of O'Connor's speech, that O'Connor's personal motives should result in the denial of First Amendment protection at the threshold. *Cf. Pickering*, 391 U.S. at 572 (recognizing that government employees "are, as a class, the members of a community most likely to have informed and definite opinions" about allocation of funds).

3. *The Pickering Scale*

As the content of O'Connor's allegations was of inherent "public concern" for First Amendment purposes, we proceed to the second test. Under *Pickering*, we are required to balance the significance of the interests served by the public-employee speech — including the employee's interests in communicating, and the interests of the community in receiving, information "on matters of public importance" — against the governmental employer's legitimate interests in preventing unnecessary disruptions and inefficiencies in carrying out its public service mission. 391 U.S. at 568-575.

We note at the outset that O'Connor's motives for speaking out are properly weighed in the balance under *Pickering*. *See, e.g., Versarge* v. *Township of Clinton*, 984 F.2d 1359, 1366 (3d Cir. 1993) (according "little weight," under *Pickering*, to plaintiff's "vengeful and obstructionist interests in speaking out on issue of public concern"). Thus, insofar as self-interest

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reflection upon Steeves' suitability for elective office, that was a matter for the Nahant electorate. *See, e.g., Patrick* v. *Miller*, 953 F.2d 1240, 1247-48 (10th Cir. 1992) (perceived illegalities in City's budgeting activities constituted topic of "inherent" public concern; "'[s]peech which discloses any evidence of corruption, impropriety or other malfeasance on the part of city officials, in terms of content, clearly concerns matter of public import'") (quoting *Conaway* v. *Smith*, 853 F.2d 789, 796) (10th Cir. 1988)); *Breuer* v. *Hart*, 909 F.2d 1035, 1038 (7th Cir. 1990) (County Sheriff's alleged conversion of County property was "plainly of public concern in its substance"); *Brawner* v. *City of Richardson*, 855 F.2d 187, 191-92 (5th Cir. 1988) (Police Department's alleged misconduct in covering up internal investigations was "a matter of public interest and therefore deserves constitutional protection").

is found to have motivated public-employee speech, the employee's expression is entitled to less weight in the *Pickering* balance than speech on matters of public concern intended to serve the public interest. *Id.* Furthermore, we agree with the district court that O'Connor's motives, prominently including the evident self-interest in preserving his position as Superintendent, were less than altruistic.

Nevertheless, the legitimate interest of the Town's electorate in the type of information disclosed by O'Connor represents a public benefit entitled to great weight in the *Pickering* balance. *Id.* (citing *O'Donnell* v. *Yanchulis*, 875 F.2d 1059, 1061 (3d Cir. 1989)) ("On plaintiff's side of the balance, we must also consider the interests of the public in plaintiff's speech"). O'Connor's disclosures concerned alleged abuse of public office on the part of an elected official, a matter traditionally occupying "the highest rung of the hierarchy of First Amendment values." *Connick*, 461 U.S. at 145.[7] The strong *public* interest in such disclosures supplements O'Connor's relatively slight *personal* interest in speaking out, heavily weighting the *Pickering* scale in favor of First Amendment protection against retaliation for O'Connor's speech.[8]

On the other side of the *Pickering* scale, the Town has yet to *demonstrate* its legitimate interest, as employer, in cur-

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[7] *See also, e.g.*, *Vasbinder* v. *Ambach*, 926 F.2d 1333, 1339 (2d Cir. 1991) (public employee's *Pickering* interest is particularly great where speech involves charges of "fraudulent and corrupt practices" or other "unlawful conduct" by elected official); *but cf. Breuer*, 909 F.2d at 1041 (upholding dismissal of deputy sheriff for "whistleblowing" on corruption by sheriff, based on county's "particularly urgent need for close teamwork among those involved in the 'high stakes' field of law enforcement") (citation omitted).

[8] It is also relevant that O'Connor's factual allegations about Steeves' purchasing practices are essentially undisputed by the defendants. We are not faced with a case in which a public employee has intentionally disseminated false information. Both sides of the *Pickering* balance might be significantly affected in such circumstances. *See Brasslett*, 761 F.2d at 839 ("an employer has a greater interest in curtailing erroneous statements than correct ones, and still a greater interest in curtailing deliberate falsehoods. . . . Correspondingly, an employee's interest in making public statements is heightened according to their veracity.").

tailing the specific disclosures which O'Connor alleges were the basis for his termination. Although the Town has shown considerable disruption in the Department operations, and serious deterioration in the working relations between O'Connor and Steeves, and their respective factions, it has not yet met its burden of showing that the disruption was attributable to the exercise of O'Connor's First Amendment right to speak out on this subject, so as to warrant discharging him on speech-related grounds. On the contrary, the disruption which occurred in Department operations may as readily be attributed to unrelated factors: for example, to Steeves' allegedly unauthorized interference in the Department operations. *See, e.g., Zamboni*, 847 F.2d at 79 ("in evaluating the disruption, if any, that resulted from [plaintiff's] criticisms . . . the district court must consider whether any unrest was caused directly by [the plaintiff's] speech or whether it was exacerbated by defendants' actions"). Notwithstanding O'Connor's status as a "policy-making or confidential employee," *see Kinsey* v. *Salado Indep. Sch. Dist.*, 950 F.2d 988, 995 (5th Cir. 1992), whose position required close working relations with the Board of Selectmen, including Steeves, we cannot assume, absent some showing by defendants, that the erosion of their working relationship was due to O'Connor's protected speech. *See Brasslett*, 761 F.2d at 845-46 ("defendants must show that . . . [plaintiff's] *allegedly protected activity* had a detrimental impact on" working relationships) (emphasis added); *see also Versarge*, 984 F.2d at 1367-68 (declining to consider disruptive effects of speech that was not *alleged* by defendants as grounds for plaintiff's expulsion).

One final point warrants mention. As the district court properly noted, O'Connor failed on several occasions to publicize his allegations of Steeves' misconduct *directly* to the community; instead, he chose to direct his disclosures to the Board

of Selectmen.[9] Nevertheless, the decision to disclose his allegations to the Board, rather than the community at large, did not eliminate O'Connor's First Amendment interest in speaking out. *See, e.g., Givhan* v. *Western Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979) (employee retains personal First Amendment right to comment on issues of public concern, even if comments are made in private; "[n]either the Amendment itself nor our decisions indicate that [the right to speak out is] lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public"); *see also Rankin*, 483 U.S. at 378 (private comment to co-worker held protected under *Pickering* balance). Moreover, in addition to controlling O'Connor's employment, the Board of Selectmen is the Town's highest elective body, with representative responsibility for acting in the best interests of the Town and its citizenry. Hence, O'Connor's decision to address the Board, rather than the community at large, was no mere private communication, nor did it in any sense extinguish the inherent public interest in his disclosures of Steeves' alleged misconduct.[10] Everything considered, and viewing the record in the light most favorable to O'Connor, we are unable to conclude that the Town's interest in suppressing O'Connor's speech

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[9] Although O'Connor raised allegations against Steeves' at several "public meetings" prior to July 1990, the district court noted that few, if any, members of the public attended these meetings. O'Connor also published several internal memoranda, on Department stationery, discussing misuse of Department accounts, but the memoranda did not mention Steeves.

[10] Indeed, a public employee, whose disclosures have the potential to disrupt the employing agency or department, may act responsibly by taking steps to minimize disruption by limiting dissemination to the public authorities most directly concerned. *See Rankin*, 483 U.S. at 389 (noting that employee "had [not] discredited the office by making her statement in public," where offensive remark "was evidently made in a private conversation with another employee"); *Hubbard* v. *E.P.A.*, 949 F.2d 453, 458 (D.C. Cir. 1991) ("This case does not present a situation in which a government employee has jeopardized an employer's operation by calling a press conference or indiscriminately leaking sensitive information"), *Breuer*, 909 F.2d at 1042 (finding employee's statements on official corruption unprotected, despite the fact that the employee "may have genuinely hoped to force

outweighed the importance of the legitimate public interest in O'Connor's disclosures.[11]

5. *Causation*

The Town may have reserved its strongest defense for the next round. On the record before us, O'Connor would have grave difficulty demonstrating that the protected speech was a "substantial or motivating" factor in his discharge by the Town. *Mt. Healthy*, 429 U.S. at 274[12]. O'Connor's alleged

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the sheriff to make changes for the ultimate benefit of the Department," because the employee's "method . . . was to immerse himself in an intra-departmental contest with the sheriff"); *Conaway*, 853 F.2d at 798 ("[t]he relatively low key context in which [the public employee] voiced his complaints further persuades us that the *Pickering* balance tilts in his favor").

[11] As the district court determined, however, O'Connor's claims against the Selectmen must be dismissed on the ground of qualified immunity. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). "Because *Pickering's* constitutional rule turns upon a fact-intensive balancing test, it can rarely be considered 'clearly established' for purposes of the *Harlow* qualified immunity standard," at least where substantial disruption has been shown to exist as a basis for the discharge. *Bartlett* v. *Fisher*, 972 F.2d 911, 916-17 (8th Cir. 1992) (collecting cases). *See also Frazier* v. *Bailey*, 957 F.2d 920, 931 (1st Cir. 1992) ("if the existence of a right or the degree of protection it warrants in a particular context is subject to a balancing test, the right can rarely be considered 'clearly established,' at least in the absence of closely corresponding factual or legal precedent").

[12] The purpose of the *Mt. Healthy* test is to ensure that the employee is not placed

> in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. . . . A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

429 U.S. at 285-86. Here, O'Connor's last-minute public revelation of Steeves' purchasing practices, at the July 10 Board meeting, suggests the precise situation which *Mt. Healthy* sought to avoid: an effort by O'Connor

lack of qualifications for the Superintendent's position, combined with the public concern over the Town water crisis, may well have provided neutral, non-speech related reasons for Edwards' and Steeves' votes against O'Connor's retention. Unless O'Connor can present evidence demonstrating that the discharge was motivated by his protected speech, the Town may yet be entitled to judgment under the *Mt. Healthy* test. We are not in a position to make this determination, however, as the Town assumed, for summary judgment purposes, a causal link between the protected speech and O'Connor's subsequent discharge.

III

CONCLUSION

As political affiliation was an appropriate qualification for the Superintendent position, we affirm the grant of summary judgment for the Town on O'Connor's political discharge claim. The judgment dismissing all claims against the individual defendants on the grounds of qualified immunity is likewise affirmed. Finally, we vacate the summary judgment dismissing O'Connor's "whistleblowing" claim against the Town, and remand for further proceedings consistent with this opinion.

The judgment of the district court is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent herewith. Costs are awarded to the individual defendants. The appellee town and appellant O'Connor shall bear their own costs.

(when his discharge appeared inevitable) to place himself "in a better position" to raise a later constitutional challenge to his discharge.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 92-2134

PATRICK J. O'CONNOR,
PLAINTIFF, APPELLANT,
v.
ROBERT W. STEEVES, ET AL.,
DEFENDANTS, APPELLEES.

Before
BREYER, *Chief Judge*,
ALDRICH, *Senior Circuit Judge*,
TORRUELLA, SELYA, CYR, BOUDIN
and STAHL, *Circuit Judges*.

ORDER OF COURT

Entered: July 1, 1993

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.

By the Court:

/s/ FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs. Denver and Foskett]

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action Number
90-11935-WF

PATRICK J. O'CONNOR,
PLAINTIFF,
v.
ROBERT W. STEEVES, ET AL.,
DEFENDANT.

MEMORANDUM AND ORDER

WOLF, D.J. August 28, 1992

I. INTRODUCTION

Plaintiff Patrick O'Connor is the former Superintendent of the Department of Public Works ("Superintendent") of the Town of Nahant, Massachusetts (the "Town"). He has brought this case seeking compensatory and punitive damages as well as attorney's fees under 42 U.S.C. §1983 against each member of the Town's current Board of Selectmen (the "Board"), Robert W. Steeves ("Steeves"), Harry W. Edwards ("Edwards"), and Richard J. Lombard ("Lombard"), as well as against the Town of Nahant itself.

Plaintiff alleges various civil rights violations arising out of his termination as Superintendent by the Board in July, 1990. The plaintiff asserts, among other things, that he was fired in unlawful retaliation for the exercise of his rights of free speech and political association guaranteed by the First Amendment to the United States Constitution. *See* Complaint, ¶¶ 19-20, 30-31, 36. In addition, plaintiff contends that he was unlawfully deprived of his property without due process of law in violation of the Fourteenth Amendment.

See Complaint, ¶28. The plaintiff also asserts pendent state claims under the Massachusetts Civil Rights Act ("MCRA"), M.G.L. Ch. 12, §11I, and for breach of implied contract under state law. *See* Complaint, ¶¶36, 24-26. Defendants deny these contentions.

The defendants have moved for summary judgment under Fed. R. Civ. P. 56 on all of plaintiff's claims. The court held hearings on the motion for summary judgment on February 13 and March 2, 1992. For the reasons described in detail below, the court concludes that defendants' motion for summary judgment should be granted on all of plaintiff's federal and state claims.

Given the number and complexity of issues involved in this case, a brief summary of the court's decision is appropriate at the outset. Section II of this opinion recounts the material facts relevant to the court's decision. Section IIIA summarizes the standard applied by the court in deciding the motion for summary judgment. Section IIIB analyzes plaintiff's First Amendment claim alleging that his termination was in retaliation for his political affiliation. Section IIIC is a discussion of plaintiff's First Amendment claim for unlawful retaliation based on plaintiff's "whistleblowing." Section IIID of the opinion rejects plaintiff's claim that he was unlawfully deprived of due process of the law. And, finally, Section IIIE discusses why summary judgment should be granted on plaintiff's pendent claims under Massachusetts law.

II. THE FACTS

Except where otherwise noted, the following is a statement of the undisputed material facts. In accordance with the legal requirements of Fed. R. Civ. P. 56(b), all conflicts in the evidence have been resolved in favor of plaintiff, as the non-moving party. *Stepanischen* v. *Merchants Despatch Transportation Corp.*, 722 F.2d 922, 928 (1st Cir. 1983).

The plaintiff Patrick O'Connor ("O'Connor") as well as the defendants Lombard, Steeves and Edwards are all residents of the town of Nahant, Massachusetts. Nahant is a small town north of Boston with a population of approximately 4,200.[1]

The Nahant Town Charter provides for the executive powers of the municipal government to be vested in a three person Board of Selectmen. Each member of the Board is elected for a three-year staggered term so that the term of office of one member of the Board expires every year. The Board of Selectmen serves as "the chief policy-making agency of the Town." Nahant Town Charter, §3.4, Exhibit 1, ("Ex. 1,") to Plaintiff's Appendix.

The defendants Lombard, Steeves and Edwards were members of the Board of Selectmen during the time period relevant to this litigation. Edwards became a member of the Nahant Board of Selectmen by election in April, 1990. Jane Solomine ("Solomine") was a member of the Nahant Board of Selectmen until she was defeated by Edwards in the April, 1990 election. Prior to his election to the Board in 1989, Steeves was the Superintendent of Public Works for the Town of Nahant.

Plaintiff O'Connor has been active in Nahant local politics for several years. He has known Lombard for approximately 25-30 years and Solomine for approximately 35-40 years. Plaintiff has worked on both Solomine's and Lombard's campaigns for election to the Board of Selectmen.

The election of Steeves to the Board in approximately February, 1989, created a vacancy in the position of Nahant Superintendent of Public Works. The Board of Selectmen solicited applications for the job in the spring of 1989. Plaintiff submitted an application for the job on June 29, 1989. *See* First Foskett Affidavit, "Foskett Aff.," Ex. G-2. As part of his application, plaintiff signed a written three-page form. At

[1] 4,200 is the total population of Nahant as of 1989. *See* "Classified Advertisement for job of Nahant Superintendent of Public Works," *The Boston Globe*, May 21, 1989; Exhibit 3 to Plaintiff's Appendix.

the bottom of the third page, above O'Connor's signature, the form stated:

> I understand and agree that if hired my employment is for no definite period and may, regardless of the date of payment of my wages and salary, be terminated at any time without any prior notice.

Id. Ex. G-3.

At a Board of Selectmen meeting on July 20, 1989, O'Connor was appointed the Superintendent of Public Works for Nahant. The appointment was made by a 2-1 vote, Lombard and Solomine voting in favor, and Steeves voting against. *See* Foskett Aff., Ex. F-1. Steeves opposed plaintiff's appointment and, at the July, 1989 meeting at which the appointment was announced, Steeves did not shake plaintiff's hand or congratulate him. A week later, plaintiff received a written certificate of appointment signed by the three members of the Board of Selectmen stating that he was appointed Superintendent of the Department of Public Works "effective July 31, 1989 - June 30, 1990." Foskett Aff., Ex. G-4.

The salary for the Nahant Superintendent of Public Works is $41,286.00. The Nahant Police and Fire Chief each earn $41,365.00 annually and the Superintendent of Schools earns $48,000.00. *See* Appendix, Affidavit of Nancy Merrick, "Merrick Aff.," Ex. 12. Within the Department of Public Works, the salaries range from $20,000 - 24,000 for a Laborer to $31,000 - 35,000 for a Foreman. *Id.*

The Nahant Town Charter, Section 3-4(e), provides in pertinent part, as follows:

> The Selectmen shall appoint a Superintendent of Public Works. . . . He shall administer, under the supervision of and direction of the Selectmen, a Department of Public Works and the highway, water, sewer, cemetery, tree warden and health departments. . . . He shall be responsible for the administration of all departments

> within the scope of his duty, and shall hold office subject to the will of the Selectmen. . . .

Id. Ex. H.

Among the duties specified in the job description for the Nahant Superintendent of Public Works are:

> Attends meetings of the Board of Selectmen, formulates, develops, recommends departmental policies, projects, and procedures; implements, administers policies and directives of the board; In times of emergency, coordinates activities with other Town activities to protect the interests of the town and to promote the public welfare; Prepares capital and operating budget annually for approval of the Board of Selectmen; . . . Maintains liaison with county, state and federal agencies to insure awareness of continuing and/or new programs that are or will be of interest and benefit to the DPW and the Town.

Id. Ex. I. The job description also characterizes the responsibilities of the Superintendent in the following manner: "Work is performed with professional independence and considerable latitude for independent administrative judgment," and "Makes frequent contacts with other officials and the general public." *Id.*

From the first day O'Connor began performing his duties as Superintendent of Public Works, on approximately August 1, 1989, a personality conflict developed between plaintiff and Steeves. O'Connor believed that Steeves wanted to continue his "hands-on" role in the Department, notwithstanding that he was no longer the Superintendent. Plaintiff felt that he was being "undermined" within the Department by Steeves' continuing direct involvement in its day-to-day operations. Deposition of Patrick O'Connor, "O'Connor Dep." v.

II, at 88-89. O'Connor felt compelled on many occasions to ask Steeves to stay "out of doing my job." *Id.* at 107.

More specifically, O'Connor complained that Steeves was charging items to the Town which he purchased for personal use without O'Connor's authorization. Although Steeves paid for these items himself, by charging them through the Town, he was apparently able to avoid paying the Massachusetts sales tax of five percent.[2] In the course of discovery, plaintiff produced five invoices which he alleges document the fact that Steeves improperly made charges through the Town.[3] The total amount for the charges on these invoices is less than $500.[4]

Plaintiff approached Steeves personally several times, commencing in the fall of 1989, to tell him to stop his practice of charging items to the Town. Eventually, O'Connor made his request to the Board of Selectmen. His purpose in going to the Board was to "ask [Steeves] to stop charging so we could have some accountability through the financial system and all these invoices and everything else." O'Connor Dep., v. II, at 141-143.

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[2] A "State Auditor's Report on Certain Activities of the Town of Nahant" dated September 23, 1991 was conducted of all charges made to the Town of Nahant from July 1, 1987 to June 30, 1990. *See* Ex. K to Plaintiff's Appendix. In the report, the auditor found 32 purchases of approximately $2,600 that were improperly "made for the benefit of employees and private citizens of the town" during this period. *Id.* at 3. The auditor described the problem as follows: "Although none of these 32 purchases were paid for from town funds, the individuals involved circumvented the payment of the state sales tax relating to each purchase. . . ." *Id.* Thus, the auditor determined that "the avoidance of state sales tax was $130 for these transactions." The auditor did not, however, specify any of the names of the individuals who were making such charges.

[3] These are presumably the same invoices that plaintiff "brought out" to the Town on the evening of the July 12, 1990 meeting. *See* O'Connor Dep., v. I, at 195-197.

[4] Assuming that all of the 5 invoices were items charged by Steeves, the total state sales tax that he avoided would be somewhere in the range of $20 to $25. The total annual budget for over $700,000. The total annual budget for the Town for 1990 was over $4,000,000. *See* Ex. K to P's Appendix.

Plaintiff claims that the issue of Steeves' unauthorized charging practices was discussed at public meetings of the Board of Selectmen in March and May, 1990. The defendants dispute plaintiff's contention that the issue of Steeves' unauthorized charges was ever discussed at a public meeting of the Board of Selectmen prior to July, 1990.[5]

Plaintiff issued three memoranda prohibiting unauthorized purchases within the Department of Public Works in February and July, 1990. *See* Ex. A; B; C to Plaintiff's Supplemental Memorandum, dated 2/20/90, 7/6/90, 7/12/90. These memoranda were all written on the stationery of the Nahant Department of Public Works. The memoranda neither name Steeves specifically, nor refer to any specific instances of misconduct relating to unauthorized purchases within the Department. Rather, all three letters relate to the protocol which O'Connor sought to establish whereby only DPW employees with authorization would be permitted to make charges to the Department of Public Works.

When three consecutive readings of Nahant's water supply showed unacceptable levels of contamination in the last week of March, 1990, Nahant was required to notify the Massachusetts Department of Environmental Protection which declared the Town's tap water unsafe to drink. This crisis was exacerbated by a serious lack of communication within the Department of Public Works and the Town government stemming from what had become an open dispute between O'Connor and Steeves. In his deposition, Philip Applin, an

[5] To support their contention that plaintiff did not make the allegations against Steeves public at any Board of Selectmen meeting prior to July, 1990, defendants point to the deposition testimony of Lombard, the one Selectman who consistently voted in plaintiff's favor. At his deposition, Lombard testified that the letter which O'Connor had presented to the Board was never discussed publicly prior to the July 12, 1990 meeting. Lombard Dep., at 29-30. Moreover, Edwards has submitted an affidavit in which he asserts that: "... I was never present at any Board of Selectmen's meeting, hearing or discussion of any kind in which the plaintiff claimed that Selectman Steeves had misappropriated any funds of the Town in violations of law." Second Edwards Aff., ¶¶2-5.

employee in the Department of Public Works at that time, described a complete breakdown in authority between "two cliques," one loyal to O'Connor and one to Steeves. Deposition of Philip Applin, "Applin Dep.," at 81. Applin testified that during the time of the crisis he did not want plaintiff "to be mad at us for talking to Mr. Steeves because Mr. Steeves was not supposed to be involved with bothering the Public Works employees." *Id.* at 9-26; 55-56; 62-63; 68.

The perceived mishandling of the water crisis generated extensive public controversy as evidenced by the articles in the local press of the time. *See* Foskett Aff., Ex. J. The substantial inconvenience encountered by the citizens of Nahant due to the temporary lack of safe drinking water was a critical issue in the April, 1990 election for the Board of Selectmen. *See* Foskett Aff., Ex. I. In April, 1990, Solomine was defeated in her bid for reelection to the Board of Selectmen by Edwards. Steeves had openly campaigned on Edwards' behalf.

By early May, 1990, O'Connor was aware that the Selectmen Edwards and Steeves were reluctant to retain him as Superintendent of Public Works. In May, 1990, plaintiff had conversations with both Edwards and Steeves during which they expressed their intention to terminate him. Steeves told O'Connor that he intended to terminate him because O'Connor had run Solomine's campaign, an assertion which O'Connor denied, and because O'Connor had told another Department of Public Works employee not to vote for Edwards, which O'Connor denies. *See* O'Connor Dep., v. i. at 167-69, 171. Edwards told O'Connor that he intended to terminate him because Edwards had received numerous telephone calls from residents opposed to O'Connor remaining in office, presumably because of the water crisis, and that he therefore had a "mandate of the Town" to do so. *Id.* at 173; v. II, at 11-12.

At the Board of Selectmen meeting on May 24, 1990, sixty-seven job positions within the Town, including that held by O'Connor, were brought before the Board of Selectmen for reappointment for the next fiscal year, commencing July 1,

1990. All but plaintiff's job position were "passed," that is, approved for reappointment. *See* Foskett Aff., Ex. F-2. Lombard moved that O'Connor's position be reappointed as well, but the motion was not seconded. *Id.*

At the next Board of Selectmen meeting on June 28, 1990, the subject of O'Connor's job position came up again. At this meeting, Lombard again moved to reappoint O'Connor, but the motion was not seconded. *Id.* Ex. F-3. Steeves then moved to terminate O'Connor. The Board went into executive session and eventually came back into public session, at which time the motion to terminate O'Connor was withdrawn. *Id.*

Between July 1, 1991 and July 12, 1990, O'Connor continued to perform the duties of the Superintendent of the Department of Public Works. On July 12, 1990, at a meeting of the Board of Selectmen, the subject of his job tenure came up for the third time. Before a vote was called, O'Connor went to his office and pulled the records of invoices which Steeves had charged on the Town's account. He brought the records back to the meeting. At his deposition, O'Connor explained the motivation for his actions on the evening of July 12:

> I was sitting there and . . . all of a sudden my employment problem came up again . . . it had started all over again and they were about to fire me . . . I went to my office and I grabbed the files I had regarding the xerox copies of invoives and so forth and so on. And I just told him, I said, "Fine, if you are going to fire me, that's it, but before I go, I don't want this to be sour grapes. You guys already made your vote, here is all the stuff that I've got."

O'Connor Dep., v. I, at 195-97.

On the second day of his deposition, O'Connor implied that the Board of Selectmen meeting of July 12 was the first time that the "Town" was informed of Steeves' allegedly improper activities:

Q. And you brought it out for what purpose?

* * *

A. Because I wanted to show that townspeople what the town was run — how the DPW was run and what was really going on in the town hall.

Q. But the town already knew that, wasn't that so?

A. The town never did, no.

Q. The Board of Selectmen knew about it, didn't they?

A. That doesn't mean the town knows it.

Q. You told the Board of Selectmen at a public meeting, did you not?

A. Yes. But the town didn't know about it. The town didn't know about it until after, after the selectmen had voted that night on a motion by Richie Lombard to bring the state auditors in there.

O'Connor Dep., vol. II, at 142-43.

After O'Connor's return to the meeting and despite his disclosure of the invoices, the Board of Selectmen voted 2-1 to fire the plaintiff. Selectmen Steeves and Edwards voted in favor, and Lombard voted against O'Connor's termination.

III. ANALYSIS

A. *Summary Judgment Standard*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]he court must look at the record in the light most favorable to the party opposing the motion and must indulge all inferences favorable to that party." *Stepanischen* v. *Merchants Despatch Transportation Corp.*, 722 F.2d 922, 928 (1st Cir. 1983); *see also Griggs-Ryan* v. *Smith*, 904 F.2d 112, 115 (1st Cir. 1990).

In civil procedure, summary judgment's role is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Garside* v. *Osco Drug, Inc.*, 895 F.2d 46, 50 (1st Cir. 1990). When requesting summary judgment, the moving party "must put the ball in play, averring 'an absence of evidence to support the nonmoving party's case.'" *Garside*, 895 F.2d at 48, *quoting Celotex Corp.* v. *Catrett*, 477 U.S. 317, 325 (1986).

To defeat a summary judgment motion, the non-moving party must then "document some factual disagreement sufficient to deflect brevis disposition." *Mesnick* v. *General Electric Co.*, 950 F.2d 816, 822 (1st Cir. 1991). As the First Circuit has noted: "[n]ot every discrepancy in the proof is enough to forestall a properly supported motion for summary judgment; the disagreement must relate to some genuine issue of material fact." *Id.* For a plaintiff in a civil case to defeat a motion for summary judgment, for example, the plaintiff must demonstrate a genuine issue of material fact on every element essential to his case in chief. *Id.* at 825; *Celotex*, 477 U.S. at 323.

A genuine issue is one where the party opposing summary judgment provides evidence "such that a reasonable jury could return a verdict for the nonmoving party." *Daury* v. *Smith*, 842 F.2d 9, 11 (1st Cir. 1988), *quoting Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact, in other words, is "not the stuff of an opposing party's dreams. On issues where the non-movant bears the ultimate burden of proof, he must present definite, competent evidence to rebut the motion." *Mesnick*, 950 F.2d at 822.

Such evidence "cannot be conjectural or problematic; it must have substance in the sense that it limns differing versions of the truth which a fact-finder must resolve at an ensuing trial." *Mack* v. *Great Atl. & Pac. Tea Co.*, 871 F.2d 179, 181 (1st Cir. 1989); *see also Matsushita Electrical Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (opponent of summary judgment motion must "do more than simply show that there is some metaphysical doubt as to the material facts.")

The First Circuit, while cautioning that courts should apply the controlling summary judgment standards carefully, has noted that "[o]ver time, summary judgment has proven its usefulness as a means of avoiding full-dress trials in unwinnable cases, thereby freeing courts to utilize scarce judicial resources in more beneficial ways." *Mesnick*, 950 F.2d at 822. The precise quantum of evidence necessary in order to survive a pretial Rule 56 motion "is not susceptible to formulaic quantification." *Id.* at 825. Rather, the determination "must be made case by case, in light of the principles undergirding summary judgment, the evidentiary record, and the substantive rules of law applicable to a given case." *Id.*

Finally, while a court must be "particularly cautious" about granting summary judgment when the state of mind of one of the parties is at issue, "the existence of state of mind does not automatically preclude summary judgment." *Denton* v. *International Brotherhood of Boilermakers*, 653 F.Supp. 55, 59 (D. Mass. 1986), *quoting Stepanischen*, 722 F.2d at 928-29. Rather, "summary judgment can be appropriately entered even where elusive concepts such as motive or intent are involved." *Mesnick*, 950 F.2d at 822; *see also Medina-Munoz* v. *R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990).

B. *First Amendment: Political Affiliation*

Count I of plaintiff's Complaint alleges that his exercise of his rights to free speech and association guaranteed by the First Amendment of the United States Constitution were violated when the defendants voted to terminate him from the position of Superintendent of the Department of Public Works on July 12, 1990.[6] According to plaintiff, the decision of the Board of Selectmen to fire him was directly motivated by his "perceived involvement . . . in the 1990 Town of Nahant election and his association and or support of a candidate other

[6] Count V of the Complaint contains substantially similar allegations against Edwards. Count IV contains similar allegations against Steeves. *See* Complaint, ¶¶ 36; 31.

than the now duly elected members of the Board." Complaint, ¶¶ 19-20. O'Connor asserts that the defendants believed that O'Connor supported Solomine's effort to be re-elected to the Nahant Board of Selectmen, which failed when Edwards was elected in April, 1990.

In a series of decisions, the United States Supreme Court has defined the limitations which the First Amendment places on a public employer when it discharges or takes other employment action against an employee for reasons of the employee's political affiliation. *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Branti* v. *Finkel*, 445 U.S. 507 (1980); *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 58 U.S.L.W. 4872 (1990). These cases establish the principle that the First Amendment prohibits government officials from taking adverse action against an employee solely for being a supporter of a particular political party or politician, unless partisan or political affiliation is an appropriate requirement for the particular position involved. *Id.*

1. The Job of Superintendent of the Nahant Department of Public Works Involves Decisionmaking on Issues Where There is Room for Political Disagreement.

In *Jimenez Fuentes* v. *Torres Gaztambide*, 807 F.2d 236 (1st Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987), the Court of Appeals for the First Circuit described the test to determine whether a public employee holds a job which is insulated from politically-motivated treatment or, instead, occupies a position against which a public employer may take adverse action based on an employee's political affiliations.[7]

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[7] Although it was decided before *Rutan*, *Jimenez Fuentes* is unaffected by that decision for purposes of this case. *Rutan* simply extended the application of *Elrod* and *Branti* to cases involving adverse actions by employers short of discharge. *Rutan*, 497 U.S. ____, n.5; 58 U.S.L.W. 4874, n.5.

It is also irrelevant for purposes of this case that the *Elrod-Branti* line of cases involved employer action based on party affiliation. The doctrine

The test formulated in *Jimenez Fuentes* consists of two parts. First, the court must determine whether the employee's position involves "governmental decision making on issues where there is room for political disagreement on goals or their implementation." *Jimenez Fuentes*, 807 F.2d at 241-42. When making this determination, a court should "consider whether the agency employing the plaintiff handled matters potentially subject to partisan political differences." *Mendez-Palou* v. *Rohena Betancourt*, 813 F.2d 1255, 1258 (1st Cir. 1987). In other words, if the employee's responsibilities can be "measured solely by strictly technical or professional criteria," the job is devoid of partisan concerns and is not a proper target for patronage dismissal.[8] *Id.*

In *Jimenez Fuentes*, the First Circuit decided that the position of Regional Director of a division of the Puerto Rico Department of Housing was a job which was exempt from First Amendment protection under *Elrod* and *Branti*. The *Jimenez Fuentes* court resolved the first part of the test in favor of the employer by citing and applying the Seventh Circuit's decision in *Tomczak* v. *Chicago*, 765 F.2d 633 (7th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985). *Jimenez Fuentes*, 807 F.2d at 242-43.

In *Tomczak*, the Seventh Circuit reversed the district court's ruling that the plaintiff First Deputy Commissioner of the Department of Water for Chicago was protected from partisan termination. The district court had found that the plaintiff's decision-making authority, while broad within its

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articulated by the Supreme Court in *Elrod*, *Branti*, and *Rutan* is equally applicable to cases involving discharge based on "intra-party disputes that spring from an employee's support of his supervisor's political opponent." *Rodriguez* v. *Munoz*, 808 F.2d 138, 144-45 (1st Cir. 1986). In *Rodriguez*, the First Circuit applied the doctrine to a discharge in retaliation for an employee's decision to run for office in opposition to a same-party candidate of his supervisor's choice.

[8] The Court of Appeals noted that examples of decisions about strictly technical matters are the proper method of accounting or the best plan for computerizing an agency. *Mendez Palou*, 813 F.2d at 1258; *see De Choudens* v. *Government Development Bank of Puerto Rico*, 801 F.2d 5, 10 (1st Cir. 1986) (senior vice president of government bank.)

area, was nonetheless confined solely to "the mundane decisions concerning the repair and rehabilitation of [Chicago's] water systems." *Tomczak*, 765 F.2d at 641.

The Seventh Circuit, however, reversed the lower court's decision. It instead concluded that the district court had taken:

> an unduly myopic view of the role of politics in the seemingly apolitical context of universal provisions of services. Indeed, one of the biggest, if not the biggest, turning points in the 1979 Chicago mayoral election involved the provision of snow-removal services. The primary function of any local governmental entity is the provision of services such as police and fire protection, public schools, hospitals, transportation, and libraries, as well as quasi-utility functions such as water, garbage, and sewage services. Elections often turn on the success or failure of the incumbent to provide these services, and, as campaigns develop, the opposing sides put forth varying proposals about how best to provide services. While the ultimate goal of all sides might be the same, there is clearly room for principled disagreement in the development and implementation of plans to achieve that goal.

Tomczak, 765 F.2d at 641.

The Seventh Circuit rejected the plaintiff's argument that his position was merely ministerial, pointing out that he was required to spend time "planning, developing, and recommending the Bureau's budgetary requirements," and "developing, coordinating, and controlling 'the Bureau's activities to achieve its short- and long-range goals.'" The *Tomczak* court therefore held that the plaintiff's position was one involving "meaningful input into decision making in areas where there could be principled disagreements," and that it was exempt from the constitutional limitations imposed on the public employer by *Elrod* and *Branti*. *Id.* at 643.

Both the facts and the logic of *Tomczak* operate compellingly in the defendants' favor here. *Tomczak* involved a job, First Deputy Commissioner of the Department of Water for Chicago, that is at least qualitatively quite similar to the job held by the plaintiff in this case, — Superintendent of the Department of Public Works. Like the Deputy Commissioner of the Department of Water for Chicago, plaintiff was responsible for the important "quasi-utility functions" of providing the citizens of Nahant with "water, garbage, and sewage services." *Tomczak*, 765 F.2d at 641. The job of Superintendent of the Department of Public Works for Nahant is not one measured by solely strictly technical or professional criteria. *Mendez Palou*, 813 F.2d at 1258. In other words, the job of Superintendent involves authority greater than deciding the best method of cleaning the Town's streets or collecting the garbage.

Although the Nahant Department of Public Works is not comparable in size to its counterpart in Chicago, the practical realities of the political implications of running such a department even in a town with a population of 4,200 like Nahant, were graphically demonstrated by the public controversy concerning Nahant's water crisis in March of 1990. It is undisputed by the parties that the contamination of Nahant's water received intensive coverage in the local media and was a factor in the eventual defeat of the incumbent Selectman Solomine at the polls in April. *See* Foskett Aff., Ex. J.

The performance of the Superintendent of the Department of Public Works did, in the spring of 1990, generate a serious political disagreement over how to accomplish the deceptively "mundane" goal of providing the Town with safe drinking water. *Tomczak*, 765 F.2d at 641. The job of Superintendent, therefore, satisfies the first part of the applicable First Circuit test as a position involving governmental decision making on goals or their implementation. *Jimenez Fuentes*, 807 F.2d at 241-42; *Mendez-Palou*, 813 F.2d at 1258.

2. *The Functions of the Superintendent of the Nahant Department of Public Works are Such That Party Affiliation is an Appropriate Requirement.*

Once the first step is satisfied, a court must then examine the particular responsibilities of the plaintiff's position in "some detail." *Mendez-Palou*, 813 F.2d at 1258. The purpose of this inquiry is to determine whether the plaintiff's job resembles that of "a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement." *Jimenez Fuentes*, 807 F.2d at 242.

In elaborating on the second prong of the test, the First Circuit cited with approval the catalogue of relevant factors developed by Judge Jack Weinstein in *Ecker* v. *Cohalan*, 542 F.Supp. 896, 901 (E.D.N.Y. 1982). *Id.* at 242. In *Ecker*, Judge Weinstein wrote that:

> Among the indicia that locate a job along the spectrum between policymaker and clerk are: relative pay, technical competence, power to control others, authority to speak in the name of policymakers, public perception, influence on programs, contact with elected officials and responsiveness to partisan politics and political leaders.

542 F.Supp. at 901.

Moreover, in applying the second part of the test, ". . . the focus is on the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office [citations omitted]." *Id.* Because the test is strictly objective, "the actual past duties of the discharged employee are irrelevant." *Mendez-Palou*, 813 F.2d at 1258.

In *Jimenez Fuentes*, the First Circuit reviewed the job description for the Regional Director of a division of the Puerto Rico Department of Housing by classifying the plaintiff's specific duties into five categories: (1) policy-making functions; (2) representative functions; (3) spokesperson func-

tions; (4) personnel duties; and (5) ministerial duties. *Jimenez Fuentes*, 807 F.2d at 243-44. Of these five, the Court of Appeals held that the first four, "clearly show that the [employee] proposes, establishes, and implements public policy, is privy to confidential information, and acts as a spokesperson for the agency." *Id.* at 244. Only the last category of ministerial duties was considered by the Court to be sufficiently "neutral" with regard to "whether the position . . . more closely resembles a policymaking/confidential official than a clerk." *Id.* at 233-34.

The job description for the position of Superintendent of the Nahant Department of Public Works lists approximately twenty-three duties. Of these, at least seventeen can be characterized as "policymaking," "representative" or "personnel" functions according to the categorization developed by the Court of Appeals in *Jimenez Fuentes*.[9] Only five of the work assignments explicitly listed in the Superintendent's job description could be described as "ministerial."[10] A substantial majority of the explicit duties of the Nahant Superintendent of Public Works, therefore, fall within the category of policymaking, representative or personnel responsibilities. Furthermore, as the Nahant Superintendent of Public Works,

[9] The "policymaking" duties of the Nahant Superintendent of Public Works are as follows: (1) "supervises the provision of engineering services;" (2) "attends meetings of the Board of Selectmen, formulates, develops, recommends departmental policies, projects, and procedures, implements, administers policies and directives of the board;" (3) "establishes and monitors procedures" regarding maintenance of equipment; (4) "establishes and monitors procedures" regarding purchases of equipment and supplies "in the most efficient and economical manner;" (5) prepares specifications and documents for public bidding; (6) in emergencies, "coordinates activities . . . to protect the interest of the town and to promote the public welfare;" (7) "prepares capital and operating budget;" (8) "establishes procedures and controls" to keep expenditures within budgetary allotments.

[10] The "ministerial" duties of the Nahant Superintendent of Public Works are as follows: (1) "repairs or reconstructs town facilities as necessary;" (2) "assures that town trees are maintained;" (3) "assures that standards of planting new trees and shrubs are met;" (4) "obtains Board of Selectmen approval before exceeding appropriate funds;" (5) "provides technical assistance to other Town Boards and Committees."

plaintiff earned a salary almost double that of the other employees of the Department of Public Works. *Ecker*, 542 F.Supp. at 901.

The kinds of occupations that other federal courts have held to be immunized against politically-motivated dismissal include that of court bailiff, court clerk, road grader and bookkeeper.[11] The jobs which the courts have found to be sufficiently "policymaking" to avoid the limitations of *Elrod-Branti* include: assistant director of public information, assistant state's attorney and deputy park commissioner.[12] The job of Superintendent of Public Works is clearly more similar in terms of its responsibility to that of park commissioner than it is to that of a court clerk or bookkeeper. Plaintiff's position, therefore, was not immunized from politically-motivated termination because as Superintendent he acted as "a policymaker, a privy to confidential information, a communicator, ... whose function is such that party affiliation is an ... appropriate requirement." *Jimenez Fuentes*, 807 F.2d at 242.

3. *The Individual Defendants Are Entitled to Qualified Immunity.*

Even assuming that the job of Superintendent for the Nahant Department of Public Works is a position which is immunized from termination based on political affiliation, the individual defendants in this case are nevertheless protected by the doctrine of qualified immunity.

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[11] *See, e.g. Meeks* v. *Grimes*, 779 F.2d 417 (7th Cir. 1985) (city court bailiff); *Horton* v. *Taylor*, 767 F.2d 471 (8th Cir. 1985) (road grader); *Grossart* v. *Dinaso*, 758 F.2d 1221 (7th Cir. 1985) (bookkeeper); *Barnes* v. *Bosley*, 745 F.2d 501 (8th Cir. 1984) (deputy court clerk), *cert. denied*, 471 U.S. 1017 (1985).

[12] *See, e.g., Brown* v. *Trench*, 787 F.2d 167 (3rd Cir. 1986) (county assistant director of public information); *Shakman* v. *Democratic Organization of Cook County*, 722 F.2d 1307 (7th Cir.) (superintendent of employment for Chicago park district); *Livas* v. *Petka*, 711 F.2d 798 (7th Cir. 1983) (assistant state's attorney); *Ecker* v. *Cohalan*, 542 F.Supp. 896 (E.D.N.Y. 1982) (deputy park commissioner).

The Court of Appeals for the First Circuit has held that a public official is entitled to qualified immunity from money damages from a public employee's claim of politically-motivate dismissal as long as the job in question: (1) ". . . is not *purely* technical or scientific in nature;" and (2) "*potentially* concerned matters of partisan political interest; and (3) involved at least a *modicum* of policy-making responsibility, access to confidential information, or official communication." *Juarbe-Angueira* v. *Arias*, 831 F.2d 11, 16-17 (1st Cir. 1987) (emphasis in original).

It is important to note that the standard which an individual defendant must meet in order to be entitled to qualified immunity under *Juarbe-Angueira* is significantly less demanding than that of *Jimenez-Fuentes*, 807 F.2d 236. All that a defendant must show is that the plaintiff's job was: not *purely* technical or scientific in nature; that it *potentially* involved matters of partisan concern and a *modicum* of policymaking and/or official communication. *Juarbe-Angueira*, 831 F.2d at 14.

For the reasons discussed above, the job of Superintendent of the Department of Public Works for the Town of Nahant is clearly "not purely technical or scientific in nature;" "potentially concerns matters of partisan political interest;" and involves "at least a *modicum* of policy-making responsibility." *Id.* at 14. The individual defendants, therefore, are entitled to qualified immunity for plaintiff's First Amendment claims for patronage dismissal.

C. *First Amendment: "Whistleblowing"*

Plaintiff's second First Amendment claim involves allegations that his constitutional rights were violated when he was fired in retaliation for "blowing the whistle" on Steeves' practice of charging personal items to the Department of Public Works' account in order to avoid paying the five percent Massachusetts sales tax. More specifically, in Count IV of the Complaint, O'Connor alleges that Steeves was motivated to

vote for O'Connor's termination because he "uncovered and reported illegal activity engaged in by Steeves and in Steeves' capacity as an official of the Town of Nahant." Complaint, ¶30.

In order to decide whether a public employee's speech is protected by the First Amendment, the court must undertake a two-step method of analysis. First, the plaintiff must demonstrate that when making the speech in question, the plaintiff was speaking "as a citizen upon matter of public concern," and not "as an employee upon matters of only personal interest." *Connick* v. *Myers*, 461 U.S. 138, 147 (1983). In making this determination, a court must evaluate "the content, form and context" of the particular statement or statements, "as revealed by the whole record." *Id.*

Assuming that a plaintiff has met his burden at step one, the court must then balance the "interests of the [employee], as a citizen, in commenting upon matters of public concern" against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). Again, when undertaking this analysis, the First Circuit has emphasized that "both the character and the effect of the public employee's speech are relevant considerations." *Brasslett* v. *Cota*, 761 F.2d 827, 839 (1st Cir. 1985). Both of these determinations are to be decided by the court as a matter of law. *See Koch* v. *Hutchinson*, 847 F.2d 1436, 1441 n.13 (10th Cir. 1988) ("The protected or unprotected nature of the speech is ultimately a question of law," *citing Brasslett*, 761 F.2d at 839-40); *Czurlanis* v. *Albanese*, 721 F.2d 98, 105 (3d Cir. 1983) ("[I]t is the role of the court in a case alleging retaliatory action which violated the First Amendment to decide not only whether the speech at issue related to a matter of public concern, but also to conduct the necessary *Pickering* balancing.")

1. *Plaintiff Was Not Speaking As A Citizen On A Matter of Public Concern.*

In *Connick* v. *Myers*, 461 U.S. 138 (1983), the Supreme Court considered the circumstances in which a public employee may be discharged for the exercise of his right to free speech without violating the First Amendment. The Court held that a court should not scrutinize the employer's reasons for the discharge if the employee's speech did not address a "matter of public concern." 461 U.S. at 146-49. The court concluded that:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency in reaction to the employer's behavior.

Id. at 147.

In *Connick*, the Court held that a questionnaire prepared by an assistant district attorney in New Orleans which implicitly criticized the office's transfer policy, morale, the lack of a grievance committee, and the level of confidence in supervisors was not protected speech because it did not address matters of public concern. The Court reasoned that the questionnaire represented a personal conflict between the assistant district attorney and her superiors, and was thus not a matter worthy of public scrutiny. More specifically, as the Court stated:

> [T]he questionnaire . . . would convey no information at all other than the fact that a single employee is upset with the status quo . . . these questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre.

461 U.S. at 148.[13] *See Alinovi* v. *Worcester School Committee*, 777 F.2d 776, 786-87 (1st Cir. 1985) (public school teacher's posting of letters from administration criticizing her behavior was unprotected speech because it did not address matter of public concern.)

Construing *Connick*, the Court of Appeals for the Seventh Circuit held that the issue of whether an employee's speech addresses matters of public concern turns in large part on the employee's motivation in exercising the speech. Where the employee's actions arise out of a private personnel dispute and are intended to redress the employee's grievance, a federal court may not scrutinize the employer's reasons for discharge. *Callaway* v. *Hafeman*, 832 F.2d 414 (7th Cir. 1987). The court reasoned that *Connick:*

> requires us to look at the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?

Callaway, 832 F.2d at 417 (citations omitted) (emphasis in original).

A Court must consider three factors in order to decide whether speech is protected: (1) the content of the speech; (2) the form or forum in which the speech was made; and (3) the context in which the speech was made. *Connick*, 461 U.S. at 147. None of the three factors, however, standing alone, is determinative of the ultimate issues of whether the plaintiff was speaking as a citizen on a matter of public concern.

For example, although the courts have noted that speech which, by its content, attempts to disclose evidence of corrup-

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[13] The Supreme Court did, however, find that one of the questions on the questionnaire which asked whether district attorneys "ever feel pressured to work in political campaigns on behalf of office supported candidates," was protected speech because it did in fact touch upon a matter of public concern. *Connick*, 461 U.S. at 149.

tion or impropriety by public officials typically constitutes a matter of public concern, *see, e.g. Conaway* v. *Smith*, 853 F.2d 789, 796 (10th Cir. 1988); *Koch* v. *Hutchinson*, 847 F.2d 1436, 1446 n.17 (10th Cir. 1988), the courts have also noted that: "[b]ecause almost anything that occurs within a public agency could be of concern to the public, . . . the mere facts that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment." *Terrell* v. *University of Texas System Policy*, 792 F.2d 1360, 1362 (5th Cir. 1986).

Moreover, the forum in which an employee's speech does not necessarily have to be public in order for the speech to be protected by the First Amendment. *See, e.g. Rankin* v. *McPherson*, 483 U.S. 378, 386 n.11 (1987); *Givhan* v. *Western Line Consolidated School Dist.*, 439 U.S. 410, 414-16 (1979). The converse of this proposition, however, is also true, i.e. merely the fact that public employee disclosed something to the local newspaper does not automatically qualify his or her speech as protected under *Connick*. *See Koch* v. *Hutchinson*, 847 F.2d 1436 (10th Cir. 1988) (fire marshall's report stating opinion as to cause of fire did not involve matter of public concern, although report received media coverage.)

Indeed, the case law indicates that rather than isolating any one particular aspect of the speech, a court should instead examine a public employee's speech as part of the "whole record" in order to determine whether it addresses a matter of public concern.

Connick, 461 U.S. at 148.

i. *The Content of Plaintiff's Speech.*

The speech which plaintiff claims eventually motivated the Board of Selectmen to terminate him consists of his allegations that Steeves was improperly charging items to the Department of Public Works' account. As indicated earlier, the State Auditor's Report confirms that from 1987 until 1990 certain employees in the Department of Public Works were charging

items for personal use to the Town's account in order to avoid paying the five percent Massachusetts sales tax. *See* Ex. K to Plaintiff's Appendix.

Plaintiff has produced five invoices which he alleges document the fact that Steeves improperly made charges through the Town in order to save the sales tax.[14] The total amount for the charges on these invoices is less than $500. Assuming that each of the five invoices were items charged by Steeves for personal use, the total state sales tax saved would be somewhere in the range of $20 to $25.

The fact that a public employee has improperly and perhaps even illegally charged personal items to the government in order to avoid paying sales tax is, by its very nature, an issue which should merit the public's legitimate concern. *See Conaway*, 853 F.2d 796; *Koch*, 847 F.2d at 1446 n.17. In this case, however, even assuming all of plaintiff's allegations to be correct, the total amount of alleged public corruption by Steeves amounts to no more than $25. As indicated earlier, the total annual budget for the Department of Public Works is over $700,000 and the Town's total annual budget is over $4,000,000. *See* Ex. K to Plaintiff's Appendix. Given these numbers, the court concludes that although disturbing in principle, the scope of the alleged malfeasance by Steeves was *de minimis*. The content of plaintiff's speech in this case, therefore, did not inherently address a matter of public concern.

ii. *The Form of Plaintiff's Speech.*

Plaintiff claims that he first informed the individual members of the Board of Selectmen about the problem with Steeves' charging in the fall of 1989, and then collectively at public meetings of the Board of Selectmen in March and May, 1990. *See* O'Connor Aff., ¶¶5-7. The defendants dispute the

[14] These are presumably the same invoices that plaintiff "brought out" to the Town on the evening of the July 12, 1990 meeting. *See* O'Connor Dep. v. I, at 195-97.

contention that the issue of Steeves' unauthorized charges was ever discussed at a public meeting of the Board of Selectmen prior to July, 1990. Because this is a motion for summary judgment, however, the court will accept as true for purposes of this motion, plaintiff's contention that the issue of Steeves' unauthorized charges was raised at public meetings of the Board of Selectmen in March and May, 1990. *Stepanischen*, 722 F.2d at 928.

The undisputed facts indicate, however, that even assuming the Board meetings in the spring of 1990 at which the issue of Steeves' unauthorized purchase was discussed were "public," no citizen of the Town nor member of the local press was either present or, if present, was paying sufficient attention to be informed of O'Connor's allegations. Indeed, plaintiff acknowledged this under oath at his deposition when he stated that "the town didn't know about [Steeves' purchases]" prior to the July 12 meeting when O'Connor produced the invoices and was subsequently fired. O'Connor Dep., v. II, at 142-43.

Although the law does not require a plaintiff to "hold a press conference" or even to "leak" his allegations in order to bring his speech alleging public corruption within the ambit of the "public concern" protection of the First Amendment, a plaintiff must still "present some evidence that []he publicized ... [the allegations] out of concern for the public interest." *Barkoo* v. *Melby*, 901 F.2d 613, 619 (7th Cir. 1990). Here, there is simply no "definite, competent" evidence that plaintiff made any attempt to bring Steeves' alleged malfeasance to the Town's attention before the evening of July 12. *Mesnick*, 950 F.2d at 822.

Moreover, the court concludes that plaintiff spoke about the issue of Steeves' improper charges in order to vindicate his own personal employment dispute with Steeves and not out of a concern for the public interest. This conclusion is supported by the three letters which the plaintiff wrote in February and July, 1990. *See*, Ex. A, B, C to Plaintiff's Supplemental Memorandum, dated 2/20/90, 7/6/90, 7/12/90.

These letters are all internal memoranda written on the stationery of the Nahant Department of Public Works. Although the letters make clear plaintiff's policy of prohibiting unauthorized purchases by Town employees, none of the letters names Steeves specifically, nor even mentions any specific instances of misconduct. The court finds that if plaintiff had truly wanted to bring the issue of Steeves' charging practices to the public's attention prior to July 12, he would have chosen a means more likely to arouse public concern than the internal office memoranda he sent.

iii. *The Context of Plaintiff's Speech.*

The most crucial consideration concerning the context of plaintiff's speech is the chronology of the undisputed material facts. Addressing a claim of age discrimination, the Court of Appeals for the First Circuit recently placed significant emphasis on "the sequence of events in th[e] case" in granting the defendant's motion for summary judgment. *Mesnick*, 950 F.2d at 828. This issue of timing is one that the Court of Appeals for the Seventh Circuit found to be significant in undergoing the "public concern" analysis required by *Connick*. *Callaway*, 832 F.2d at 417.

Steeves was O'Connor's immediate predecessor as the Superintendent of the Department of Public Works prior to the time he was elected Selectman in 1989. Steeves was also the only Selectman to vote against plaintiff's appointment to Superintendent. *See* O'Connor Dep., v. I at 208-09; v. II at 158-59. The dispute between O'Connor and Steeves was clearly a personal one which had a history going back as far as Steeves refusal to shake O'Connor's hand when O'Connor was appointed Superintendent back in July, 1989. *Id.*

Moreover this clash of both personalities and politics continued throughout O'Connor's term as Superintendent as symbolized by O'Connor's repeated demands that Steeves discontinue playing a role in the Department and by the support of Steeves and O'Connor for rival candidates in the April,

1990 election campaign between Solomine and Edwards. *Id.* v. I, at 105-06; v. II, at 89-89.

The most telling piece of evidence, however, that plaintiff's speech was not intended to address a matter of public concern is the fact that plaintiff did not choose to reveal the invoices to the "Town" until the July 12, 1990 meeting of the Board of Selectmen, at a point in time when he knew his own job to be in imminent jeopardy and, indeed, when he felt the Selectmen "were about to fire" him. O'Connor Dep., v. I, at 195-97; v. II, at 141-43.

The context of plaintiff's speech, therefore, causes the court to conclude that the plaintiff "was not attempting to speak out as a citizen concerned with problems facing [the Town of Nahant];" but instead was speaking "as an employee attempting to resolve his own private dilemma." *Callaway*, 832 F.2d at 417. The content, form and context in which O'Connor made his allegations against Steeves, as revealed by the whole record, all demonstrate that plaintiff was speaking "not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest." *Connick*, 461 U.S. at 147. This court is not the appropriate forum, therefore, in which to review the wisdom of the personnel decision taken by the Board of Selectmen of the Town of Nahant, Massachusetts on July 12, 1990. *Id.*

2. *Nahant's Interest In Promoting the Efficiency of the Department of Public Works Outweighs Plaintiff's Interest in Speaking Out to Correct the Allegedly Improper Charging Practices.*

Assuming, however, that the plaintiff was speaking as a citizen upon a matter of public concern in making the allegations against Steeves, plaintiff's speech is still not protected by the First Amendment because he fails the second step of the relevant constitutional analysis.

The Supreme Court in *Pickering* set forth the general test for the second step in determining whether a public em-

ployee's speech on matters of public concern is protected by the First Amendment. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). Rejecting the argument that an individual, merely by accepting public employment, relinquishes his First Amendment rights, the Court recognized that the government's interest as an employer in regulating an employee's speech differs from its interest in regulating the speech of the general public. *Id.* at 567-68.

Accordingly, the Court formulated a balancing test which recognized these pertinent concerns. Under *Pickering*, a court must weigh the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*

The Supreme Court, however, explicitly left open the question of how it would resolve situations which involved:

> positions in public employment in which the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them . . .

Id. at 570, n.3. Sixteen years later, the Court sought to elaborate by explaining that "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick*, 461 U.S. at 151-52.

In *Breuer* v. *Hart*, 909 F.2d 1035 (7th Cir. 1990), the deputy sheriff of Warren County, Illinois sued the sheriff for firing him in alleged retaliation for his making allegations including, among others, that the sheriff had taken two television sets and two microwaves from the evidence locker for his

own personal use and that he had been charging gasoline for his *own personal use to the County.*[15] *Id.* at 1037.

The Court of Appeals for the Seventh Circuit reversed the district court's decision that Breuer had not spoken as a citizen upon matters of public interest under *Connick*, but upheld the ruling because under *Pickering*, there was "strong evidence that Breuer's speech interfered with his own work and with the operation of the sheriff's office." *Breuer* 909 F.2d at 1041. The Seventh Circuit referred to a "serious schism" that had divided the Department as a result of Breuer's allegations and concluded that his conduct was "reasonably calculated to create disharmony or to have impaired discipline." *Id.*

The court in *Breuer* expressed some sympathy for the "Catch-22" dilemma that a potential whistleblower faces between collecting evidence about the malfeasance and thus risking disruption of the workplace, or not collecting information and thus risking an ineffective investigation. The Court nevertheless concluded that:

> [w]hat may appear to be reckless and purely self-serving behavior in one context may appear appropriate in another, particularly with the benefit of hindsight. The defect in raising such dilemmas, here, however, is that it ignores the balance which the Supreme Court has already struck in *Pickering* and its progeny . . .

Id. According to the Court, then, even the fact that "Breuer may have genuinely hoped to force the sheriff to make changes for the ultimate benefit of the Department," was not sufficient to tip the scales in his favor under *Pickering* because "his method . . . was to immerse himself in an intra-department contest with the sheriff." *Id.* at 1042.

[15] A representative of the Attorney General apparently concluded that no criminal charges would be brought against the sheriff, Hart, for his alleged misappropriation. During the litigation, although Hart denied the substance of the allegations, he did not allege that Breuer knowigly or recklessly made false statements charging him with malfeasance. *Breuer*, 909 F.2d at 1037 n.2.

The Court of Appeals for the First Circuit has interpreted this balancing test as involving three basic steps:

> (1) Whether [the allegedly protected activity] was directed against those with whom the plaintiff is in regular contact such that it might impede harmony among co-workers or the ability of supervisors to maintain discipline; (2) whether plaintiff's activity has a detrimental impact on those with whom he must maintain personal loyalty and confidence for the fulfillment of his job responsibilities; and (3) with regard to erroneous statements concerning matters of public concern, whether such statement impedes plaintiff's performance of his daily duties or the regular operation of the [government unit] generally.

Brasslett, 761 F.2d 827, 844, *citing McDunough* v. *Trustees of the University of New Hampshire*, 704 F.2d 780, 784 (1st Cir. 1983).

Moreover, when undertaking this balancing test, the First Circuit has emphasized that "both the character and effect of the public employee's speech are relevant considerations." *Brasslett*, 761 F.2d at 839. In *Brasslett*, the court ruled that the employee's speech was in fact protected because, among other things, his remarks "were, neither in content nor tone, a personal attack upon anyone with whom he was required to work on a daily basis." 761 F.2d at 844. In *Connick*, the Supreme Court, applying the *Pickering* balancing test, ruled that the district attorney's questions about political campaigning was not protected speech because her supervisor was justified in his "fears that the functioning of his office was endangered" as a result of the circulation of the questionnaire. *Connick*, 461 U.S. at 153.

The Board of Selectmen for the Town of Nahant, a body which serves as both the executive and legislative branch of the municipal government, is composed of three elected

individuals. One of these individuals was Steeves who became a Selectman by means of his election in 1989.

Under the Nahant Town Charter, the Superintendent of the Department of Public Works is directly responsible to the Board of Selectman in undertaking his duties. *See* Foskett Aff., Ex. H. Indeed, one of the duties of the Board of Selectmen is to hire and, if necessary, to fire the Superintendent of Public Works. Moreover, according to his job description, the Superintendent is required to attend meetings of the Board of Selectmen, as well as to "implement and administer" the policies of the Board. *See* Foskett Aff., Ex. I.

Under the first prong of the applicable First Circuit test, a court is required to decide "whether [the allegedly protected activity] was directed against those with whom the plaintiff is in regular contact such that it might impede harmony among coworkers or the ability of supervisors to maintain discipline." *Brasslett*, 761 F.2d at 844. An examination of the structure of the Nahant municipal government indicates that the Superintendent of Public Works is required to be in "regular contact" with the members of the Board of Selectmen with whom it would be preferable from him to at least a satisfactory working relationship. *Id.*

The fact that the working relationships within Nahant's government were in fact seriously disrupted during O'Connor's tenure as Superintendent is demonstrated by the deposition testimony of Philip Applin, an employee in the Department of Public Works during the relevant time period. Applin's testimony describes the crisis environment that enveloped the Department as a result of the personality clash between O'Connor and Steeves. *See* Applin Dep., at 82-85. The crisis reached very serious proportions when Nahant's water was declared contaminated by the Massachusetts Department of Environmental Protection in late March, 1990. *Id.* at 14-26. More specifically, Applin describes a complete breakdown in authority between "two cliques," one loyal to O'Connor and one to Steeves. *Id.* at 81.

This court agrees with the Court of Appeals for the Seventh Circuit that the citizens of a small town like Nahant, or indeed of any city, would give high priority to the maintenance of an efficient police department. *Breuer*, 909 F.2d at 1041. The court also finds, however, that such citizens might give comparable high priority to access to drinkable water and working sewers. *See* Job Description of Superintendent of Department of Public Works, Foskett Aff., Ex. I. The court concludes that any interest that the plaintiff might have had in speaking as a citizen about Steeves' personal charges is outweighed by the interests of the Nahant Board of Selectmen "in promoting the efficiency of the public services it performs through" its Department of Public Works. *Pickering*, 391 U.S. at 568.

In making the allegations against Steeves, plaintiff was not speaking as a citizen on a matter of public concern. *Connick* v. *Myers*, 461 U.S. 138 (1983). Moreover, even if O'Connor was speaking as a citizen upon a matter of public concern, the Town's interest in promoting the efficiency of the Department of Public Works outweighs the plaintiff's interest in speaking out to correct the allegedly improper charging practices. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). Thus, assuming that the defendants fired the plaintiff on July 12, 1990 in retaliation for such speech, plaintiff's speech was not entitled to the protections of the First Amendment.

D. *Due Process Claim*

Count III of the Complaint alleges that the defendants violated plaintiff's constitutional rights by depriving him of his property interest in continued employment as Superintendent of the Department of Public Works without due process of the law. Plaintiff claims, among other things, that the defendants actions were "arbitrary and capricious," and were made "without affording the plaintiff notice and/or hearing conducted with generally accepted principles of elemental fairness and due process." Complaint, ¶28.

The Fifth Amendment, made applicable to the states by the Fourteenth Amendment, provides in relevant part that: "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. Amm. V. The extent to which a public employee has a constitutionally protected property interest in continued employment sufficient to invoke the due process clause, however, "must be measured by, and decided with reference to, local law." *Rosario-Torres* v. *Hernandez-Colon*, 889 F.2d 314, 319 (1st Cir. 1989).

In general, such a constitutionally protected interest can be created by an employee's expectation in continued employment, but only if such expectation is reasonable. As the First Circuit has explained:

> The greater the interest and protection accorded an interest by such substantive law, the more reasonable is the holder in expecting to enjoy it and in making decisions in reliance upon that expectation, and the less reasonable is it for the state to interfere directly with that enjoyment without according a fair opportunity to the holder to contest the interference.

Beitzell v. *Jeffrey*, 643 F.2d 870, 874 (1st Cir. 1981). A plaintiff "must have more than a unilateral expectation of the continued employment, and must instead have a legitimate claim of entitlement to it." *Id.*, *quoting Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). In the context of government employment, "a person who holds a job from which he can be removed only 'for cause' has a protected property interest, while one who can be removed 'at will' does not." *Id.*, *citing Bishop* v. *Wood*, 426 U.S. 341-44-47 (1976); *see also Jenkins* v. *Weatherholtz*, 909 F.2d 105, 107 (4th Cir. 1990); *Chilingirian* v. *Boris*, 882 F.2d 200, 203 (6th Cir. 1989).

The Nahant Town Charter states that the Superintendent of Public Works shall hold office "subject to the will of the Selectmen." Foskett Aff., Ex. H. Moreover, the three-page

employment application which O'Connor signed states above his signature that:

> I understand and agree that if hired my employment is for no definite period and may, regardless of the date of payment of my wages and salary, be terminated at any time without any prior notice.

Id., Ex. G-3.

Plaintiff claims that Lombard's question during his job interview whether O'Connor would be willing to serve for five years created a constitutionally protected property interest in the job. The First Circuit has ruled, however, that even a town charter containing far more than that of Nahant in the way of procedural protections limiting the Board of Selectmen's authority to terminate the town manager did not create a reasonable expectation sufficient to generate a property interest in employment. *Hagopian* v. *Trefrey*, 639 F.2d 52, 53-54 (1st Cir. 1981), *cert. denied*, 454 U.S. 836 (1981). *See also Bleeker* v. *Dukakis*, 665 F.2d 401, 403 (1st Cir. 1981).

Both the Town Charter and the employment application which plaintiff signed make it clear that the Superintendent of the Department of Public Works serves at the "will" of the Nahant Board of Selectmen. Plaintiff could not, therefore, have had a sufficiently "reasonable" expectation in continued employment as Superintendent of the Department of Public Works for his termination to violate his right to due process.

E. *State Claims*

1. *Plaintiff Does Not Have a Valid Claim under the Massachusetts Civil Rights Act.*

In order to establish a claim under the Massachusetts Civil Rights Act, M.G.L. c. 12 §§11H and 11I, a plaintiff must prove that: (1) his exercise or enjoyment of a right secured by the Constitution or laws of either the United States or of

the Commonwealth; (2) has been interfered with, or attempted to be interfered with; and (3) that the interference or attempted interference was by "threats, intimidation or coercion." *Bally* v. *Northeastern Univ.*, 403 Mass. 713 (1989).

Moreover, the Court of Appeals for the First Circuit recently affirmed its agreement with the judgment of the Supreme Judicial Court that the "threats, intimidation, or coercion" required by the Massachusetts Civil Rights Act must be "physical" in nature. *Biggins* v. *Hazen Paper Co.*, 953 F.2d 1405, 1424-25 (1st Cir. 1992), *citing Bally*, 403 Mass. at 719; *see also Layne* v. *Superintendent, Massachusetts Correctional Inst.*, 406 Mass. 156 (1989).

Because O'Connor has failed to allege physical "threats, intimidation or coercion," against him by any of the defendants, individually or acting in concert, there is no genuine issue as to any material fact with regard to his pendent state claim under M.G.L. Ch. 12 §§11H and 11I and thus summary judgment should be granted in defendants' favor on this claim as a matter of law.

2. *Plaintiff Does Not Have a Valid Claim for Breach of Implied Employment Contract.*

In Count II of the Complaint, plaintiff alleges an additional pendent state law claim for breach of implied contract. The Complaint alleges that the defendants, by not affirmatively terminating plaintiff at the June 28, 1990 meeting, "effectively reappointed plaintiff for an additional term in office of one year" and that by subsequently terminating him on July 12, "breached the implied employment contract of the plaintiff for the remainder of its term through and including June 30, 1991." Complaint, ¶¶24-26.

The undisputed facts relevant to this issue, however, taken in the light most favorable to the plaintiff, show the following. When he was given the job of Superintendent in July, 1989, O'Connor received a written certificate of appointment stating that his appointment was "effective" for the 11 month

period from July 31, 1989 until June 30, 1990. At the June 28, 1990 meeting of the board of Selectmen, Lombard moved to reappoint the plaintiff. Lombard's motion was not seconded. Edwards then moved to terminate the plaintiff. The Board of Selectmen recessed into executive session and upon returning, withdrew the motion, and without giving reasons for the action, "tabled" the matter. Plaintiff then served in the position of Superintendent of Public Works for an additional twelve days past the June 30, 1990 date specified in his certificate of appointment, before being terminated from his job on July 12, 1990.

Under Massachusetts law, a public employee holding an appointive office who continues in office after the expiration of his term acquires no rights, contractual or otherwise, to continue in that position. Rather:

> It is a general principle of expediency in the absence of any binding regulation that an officer may continue after the expiration of his term to exercise the duties of his position until his successor is selected and qualified. This is simply a holding over for convenience and confers no right for any defined period. It is not a part of the necessary tenure of office.

Opinion of Justices, 275 Mass. 575, 579 (1931). The plaintiff has not pointed to any authority in which this general principle of Massachusetts law has been disapproved of or overruled.

Moreover, even assuming that plaintiff did, by virtue of the Board's omissions, have an implied employment contract for another year as Superintendent, such contract would be void as violative of the Nahant Town Charter which provides that the Superintendent of Public Works serves at the "will" of the Board of Selectmen. The Town of Nahant could not enter into a legally enforceable contract in direct contravention of its own Charter. *Richard D. Kimball Co.* v. *Medford*, 340 Mass. 727, 729 (1960).

IV. ORDER

In view of the foregoing, the defendants' motion for summary judgment on all of the plaintiff's federal and state claims is ALLOWED. Accordingly, judgment shall enter for the defendants.

/s/ Mark L. Wolf
United States District Judge

Supreme Court, U.S.
FILED
NOV 18 1993
OFFICE OF THE CLERK

No. 93-498

In The

Supreme Court of the United States

October Term, 1993

TOWN OF NAHANT, MASSACHUSETTS,

Petitioner,

vs.

PATRICK J. O'CONNOR,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. When a public employee discloses to his superiors, who are the highest elected town officials, in public and private meetings, that one of those same incumbent officials is misusing, and has misused for many years, charge accounts of the town to purchase goods for himself and his friends for private use, may the court determine, as the First Circuit determined here, that the disclosure is a matter of public concern despite the personal interest of the employee in disclosure?

2. When a public employee discloses to his superiors, the highest elected town officials, that one of those same incumbent officials is misusing, and has for many years misused, town charge accounts for his own purchases and those of his friends, and when the town cannot demonstrate that the disclosure caused any disruption of services to the town, may the court determine, as the First Circuit determined here, that the interest of the public, combined with the interest of the employee, in the disclosure of such misconduct outweighs the interest of town officials in an efficient workplace?

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STATEMENT OF THE CASE

A. Introduction

The Respondent, Patrick J. O'Connor, opposes the Petition for Certiorari. First, the case is not in a procedural position for this Court's review. Nor is this case of such general importance as to require premature review. Moreover, contrary to the Petitioner's argument, the First Circuit decision in this case follows Supreme Court precedent and the decisions in the other Circuits. There is no disagreement in the Circuits on the issues presented in this case. The First Circuit has properly applied well-established tests to the particular fact pattern presented in this case. For these reasons, the Petition should be denied.

B. Substantive Facts

The Petitioner's Statement of the Case denigrates the importance and extent of the corruption revealed by O'Connor and mischaracterizes the manner of his disclosure. Defendant Steeves, one of three Selectmen, the highest elected officials in the Town of Nahant, admitted at his deposition that for years he had charged against town accounts goods for personal use and for the use of friends (App. 741).[1] The taxes were never paid on those purchases (A-4). As the First Circuit expressly noted, Steeves did not deny the allegations of misuse of town accounts (A-20, n. 8). As the First Circuit also observed, O'Connor's disclosure "apparently succeeded in piquing public interest about Steeves' purchasing practices" (A-7, n.1). After that disclosure, the State Auditor and local District Attorney investigated the charges, prepared an audit

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1. The Respondent follows the Petitioner's practice of designating by "A" the Appendix filed in this Court. References to the Appendix filed in the Court of Appeals are designated by "App.". References to the Petitioner's Brief are designated as "PB".

and identified the dangers and improprieties of the practice (A-7, n.1). After the audit was revealed, the practice stopped (App. 779-782).

That this practice was longstanding is undisputed. When Joseph Canty was appointed the Town Accountant in 1988, he became aware of the misuse of town accounts by Steeves, who was at that time the superintendent of the Department of Public Works. Canty, who learned that other employees also charged personal items against the Department of Public Works' accounts, was concerned about this matter and wrote a memorandum as early as 1988 regarding the practice (App. 433). Nevertheless, the practice went on.

The Petitioner not only trivializes the serious corruption and breach of the public trust engaged in by Defendant Steeves, but also mischaracterizes the First Circuit's view of this corruption. The Petitioner states that, "because respondent's speech bore on 'Steeves' fitness for elective office', however minimal the alleged infractions, the court held that there was no need to examine its form and context." [PB-7]. In fact, the First Circuit did not minimize the seriousness of Steeves' misconduct. The Court expressly rejected the District Court's holding that Steeves' misconduct was *de minimis* and held that the "improper purchases clearly pertained to a matter of the legitimate public interest to the community," namely, the issue of Steeves' suitability for elective office. (A-18, 19, n.6).

Thus, the first Question Presented in the Petition is clearly misleading. The First Circuit did not hold that wherever an employee discusses any elected official's fitness for elective office, the employee's speech is protected. The Circuit Court was quite specific: where the employee alleges serious corruption on the part of an incumbent elected official, one of the highest incumbent elected officials in a town, that disclosure is a legitimate

matter of public concern even if the motive for disclosure is "less than altruistic" (A-20).

The first Question Presented by the Petitioner is misleading in yet another way. The Petitioner inaccurately states that the employee "was speaking about his own employment dispute and not as a citizen seeking to disclose wrongdoing". Petitioner attempts to bolster this view of the question presented by stating in his brief that, "for more than eleven months, he [O'Connor] kept his information from the public while he battled Steeves over authority within the Department' (PB-9).

The facts are otherwise. O'Connor repeatedly discussed the misuse of the accounts with Steeves, who was then a member of the Board of Selectmen. O'Connor spoke again and again with the other two Selectmen about the matter. He raised the allegations in public meetings with the Board in the winter and early spring of 1990 (A-22, n.9). The Selectmen were not only the direct supervisors of O'Connor in his position as Superintendent of Public Works, but they were also the highest elected authority in the Town with "representative responsibility for acting in the best interests of the Town and its citizenry" (A-22). Thus, even before the date of his termination, O'Connor did not limit himself to "mere private communication" about Steeves' misconduct (A-22), as the Petitioner suggests.

The Petitioner also misstates other facts in its second Question Presented. The Petitioner says that O'Connor's disclosure caused a disruption in Town services so that his agency was "unable to effectively handle a public health crisis . . . ." However, the court found no evidence that O'Connor's disclosures were the cause of the water contamination problem. In fact, the First Circuit found that the Town had not met its burden of showing that *any disruption* was attributable to the exercise of O'Connor's First Amendment right to speak out on the subject, "so as to warrant discharging him on speech-related grounds" (A-21).

The First Circuit's opinion in this case differs substantially from the description of the opinion in the Petitioner's Brief. In the first instance, the First Circuit held that the content of O'Connor's speech, "official misconduct by any incumbent elected official," (A-18) was of inherent concern to the community, particularly where the charges were "essentially undisputed by the defendants" (A-20, n.8) and therefore that misconduct was a matter of legitimate public concern. For this reason, O'Connor's personal motives should not "result in the denial of First Amendment protection at the threshold" (A-18, 19).

In accordance with *Pickering v. Board of Education*, 391 U.S. 563 (1968), the court then went on to balance the interests served by that speech, including the employee's interest and the interest of the community, against the governmental employer's interest in avoiding unnecessary disruptions of services and inefficiencies (A-19). The court pointed out that the communication by O'Connor to the Board of Selectmen "was no mere private communication, nor did it in any sense extinguish the inherent public interest in his disclosures of Steeves' alleged misconduct" (A-22). After weighing the evidence, the Court stated that:

> The strong *public* interest in such disclosures supplements O'Connor's relatively slight *personal* interest in speaking out, heavily weighting the *Pickering* scale in favor of First Amendment protection against retaliation for O'Connor's speech. [A-20].

The court held that, on the other side of the ledger, the Town had failed to show that any disruption of services was attributable to O'Connor's disclosure. The court refused to *assume* any such connection (A-21). The First Circuit then held that, under the *Pickering* analysis, the facts weighed heavily in favor of protecting O'Connor's speech. Only after giving full scope to an analysis of

the content, form and context of O'Connor's speech and to the unsubstantiated claims of the Town that the speech had been disruptive, did the First Circuit hold that the speech enjoyed constitutional protection (A-22, 23).

After finding that speech constitutionally-protected, the First Circuit remanded the case for a trial. The Circuit Court pointed out that, under *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), O'Connor must now prove to the trier of fact that his discharge was motivated by his protected speech and that the Town can defend against that claim, that is, on the issue of causality between the speech and O'Connor's termination (A-23, 24).

REASONS FOR DENYING THE WRIT

I.

THE CASE SHOULD BE TRIED TO A CONCLUSION, AS ORDERED BY THE FIRST CIRCUIT COURT OF APPEALS, BEFORE ANY REVIEW BY THIS COURT.

The First Circuit remanded the case for a determination as to whether there was a causal link between O'Connor's protected speech and his subsequent discharge, following the mandate of this Court in *Mt. Healthy, supra.* There, this Court outlined a tri-partite procedure in adjudicating First Amendment claims of public employees. After the court has decided whether the employee's speech is a matter of public concern, the court must then weigh the interest of the employee and the public in that speech against the interests of the public employer in avoiding disruption of its services, as *Pickering v. Board of Education*, 391 U.S. 563 (1968), dictates. If the court decides, as it did here, that the employee's speech is constitutionally protected, the jury then must decide whether the exercise of free speech, or some other factor, caused the employee's termination.

The First Circuit in *O'Connor* completed the first two steps of the procedure and remanded the case for trial on the issue of causality. Until that trial is held, this case will not have been fully adjudicated and ripe for review by this Court.

This Court has often cited the lack of finality of a judgment below as a reason for denying certiorari and should deny it now for the same reason. In *Brotherhood of Locomotive Firemen v. Bangor and Aroostock R. Co.*, 389 U.S. 327, 328 (1967), the Court denied certiorari "because the Court of Appeals remanded the case [and thus] it is not yet ripe for review by this Court". In *Hamilton-Brown Shoe Company v. Wolf Brothers & Company,* 240 U.S. 251, 257, 258 (1916), the Court noted that ". . . except in extraordinary cases, the writ is not issued until final decree". Even then, the authority is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". *Id.* This Court frowns upon review of interlocutory orders from the Circuit Courts "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause". *American Construction Company v. Jacksonville, T. & K.R. Co.*, 148 U.S. 372, 384 (1893).

Although this case is certainly significant to the parties, it is a matter neither of "peculiar gravity" nor "general importance". Although many First Amendment public employee cases are decided every year, the cases are fact-intensive. No decision which this Court could render would be of such general applicability that it would alter the determination of even a small fraction of these cases. In addition, there already exists uniformity of decision among the lower courts on the issues raised in this case. *See* the next argument, *infra.*

This Court should deny certiorari and should remand the case for trial as the First Circuit ordered.

II.

THE FIRST CIRCUIT COURT OF APPEALS HAS FOLLOWED THIS COURT'S DECISIONS AND THE DECISIONS OF THE OTHER CIRCUITS AND, THEREFORE, THERE IS NO SPLIT OF AUTHORITY UPON THE ISSUES IN THIS CASE.

The First Court of Appeals has not effected in this case an "unwarranted expansion of the First Amendment's scope in public employment" (PB, 9). Contrary to the Petitioner's statements, after *O'Connor,* not every employee's speech which pertains in any way to a supervisor's fitness for office "now qualifies for *prima facie* constitutional insulation regardless of its form and context and however trivial the alleged wrongdoing" (PB-8). The First Circuit has held only that when, as here, an employee discloses to the highest public officials the admitted misuse of public funds and accounts, the abuse of the public trust, by any incumbent, elected official, that speech is constitutionally protected because it is a matter of public concern (A-15, 16, 18) even if it arises in the course of a personal dispute. This Court and the various Circuits have consistently indicated that the disclosure of public corruption and misconduct, of the kind involved here, is a matter of inherent public concern despite the personal motives of the speaker. Thus, the First Circuit's holding reflects clearly established law.

In *Connick v. Myers,* 461 U.S. 138 (1983), the seminal case, this Court held that certain speech which arose out of a private personnel dispute between the employee and the employer was nevertheless a matter of public concern. There, a disgruntled employee circulated a questionnaire among other assistant district attorneys and was fired for doing so. The employee's motive was purely personal, displeasure with a transfer. Nevertheless, the Court held that one question in the document, regarding the possible coercion of office employees to support certain political

candidates favored by their employer, addressed a matter of public concern because it was "a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal". *Id.* at 149. Since the content of part of the employee's speech addressed a public issue, that part of her speech was considered of public concern *despite* her purely personal motive.

Rankin v. McPherson, 483 U.S. 378 (1987) supports the focus on content where the public employee's speech clearly addresses a public issue. In *Rankin*, the only case after *Connick* in which this Court has addressed the question, this Court paid little attention to the form and context of McPherson's statement as reflecting her motive. As the First Circuit said, if this Court had considered motive for the employee's expression in *Rankin*, the Court probably would have decided that it "was motivated by little or no civic concern to inform the public on any relevant issue" (A-17, 18, n.5). The speech was deemed a matter of public concern after this Court determined that it addressed a public issue or topic. After *Connick* and *Rankin*, the federal courts are required to focus primarily on the content of a public employee's speech, not on his motivation, to determine whether the speech addresses a "matter of public concern" and is thus worthy of constitutional protection.

Moreover, the fact that O'Connor first discussed Steeves' misconduct with his supervisors privately before discussing it at public meetings does not vitiate his First Amendment claim. A public employee's communication on a matter "inherently of public concern" is protected speech even if made privately to superiors. In *Connick, supra*, the Court approvingly cited *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), where, even though a public employee did not speak publicly, since the content of her speech, racial discrimination, involved a matter of inherent public concern, the speech was entitled to constitutional protection. *Connick, supra* at 146.

Thus, after *Connick*, if a part of the speech addresses a public issue, that speech is a matter of public concern even if it arises out of a personal dispute, is personally motivated and is private.

Moreover, *Connick* placed a particularly high value on protecting public employees who, like O'Connor, disclose official misconduct. When this Court in *Connick* ultimately held that the employer's interest in efficiency outweighed in the *Pickering* analysis the importance of the employee's speech, the Court observed that the speech did not "seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others." *Id.* at 148. If the employee had addressed those issues, the employer's burden for justifying termination of the employee under *Pickering* would have been greater. *Connick* at 150, 152. Clearly, this Court has considered disclosure of public corruption a matter of highest concern dwarfing personal motive in importance.

The lower courts have also consistently stressed the great importance of speech disclosing corruption and have recognized the need to protect the speaker from retaliation. For example, in *Marohnic v. Walker*, 800 F.2d 613 (6th Cir. 1986), the court said that, "Public interest is near its zenith when ensuring that public organizations are being operated in accordance with law," *Id.* at 616, *citing Connick*, and "seeing that public funds are not purloined," *Id., citing Czurlanis v. Albanese*, 721 F.2d 98, 104-105 (3rd Cir. 1983). In *Roth v. Veteran's Administration*, 856 F.2d 1401 (9th Cir. 1988), the Ninth Circuit observed that "the misuse of public funds, wastefulness, and inefficiency in managing and operating government entities" are matters of public concern. *Id.* at 1405.

The Circuit Courts of Appeal have also consistently held that a public employee's disclosure of wrongdoing and corruption by public officials is a matter of inherent public concern even where

personally motivated or arising out of a personal dispute. Thus, contrary to the Petitioner's arguments, a uniformity rather than a split of decisions is found in the Circuits on this issue and the First Circuit's decision conforms fully to the decisions of other Circuits. In *Kurtz v. Vickrey*, 855 F.2d 723 (11th Cir. 1988), the Eleventh Circuit held that disclosure by a university official that "public dollars allocated for education were not actually being spent for educational purposes," *id.* at 727-728, was a matter of public concern. This was so even though the comments were voiced during an ongoing dispute between the plaintiff and the defendant about personal matters such as salary terms and even though the plaintiff took no steps to "remedy, or to inform the public at large about, the problems with which he was so gravely concerned". *Id.* at 729-730. In *Wulf v. City of Wichita*, 883 F.2d 842, 860 (1989), the Tenth Circuit held that allegations of misappropriation and misuse of public funds by officials were a matter of public concern even though "arguably linked to some degree to his personal dispute [with others]". In *McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983), the Ninth Circuit held that because the public employee's speech addressed public issues pertaining to management of the police department, the speech was per se a matter of public concern. The court disregarded the personal motivation of the speaker and the employment dispute in which he was embroiled. In *Berg v. Hunter, et al.*, 854 F.2d 238, 242 (7th Cir. 1988), *cert. denied*, 489 U.S. 1053 (1989), a public employee's speech "clearly sought vindication of his many disagreements" with his employers and was tied "inexorably to matters of only personal interest to Berg". Nevertheless, the Seventh Circuit, noting that "content is the greatest single factor in the *Connick* inquiry," *id.* at 242, 243, held that the plaintiff's charge that his superior had publicly misrepresented staff and teacher salary increases during a period of budget deficits while increasing salaries at an inflated rate to enhance his patronage "clearly involves matters of public concern". In *Breuer v. Hart*, 909 F.2d 1035, 1039 (1990), the Seventh Circuit also held that an employee's allegation of

conversion of county property by a superior was "plainly of public concern in its substance" even though this speech was motivated by a private dispute. In *Brawner v. City of Richardson, Texas*, 855 F.2d 187, 192 (1988), the Fifth Circuit held that disclosure of misconduct by police officers, including coercion of witnesses and possible illegal investigations of reporters, was a matter of public interest which deserved constitutional protection because it revealed misbehavior by public officials. There was no discussion of the plaintiff's motives. In *Johnson v. Lincoln University of the Commonwealth System of Higher Education*, 776 F.2d 443 (1985), the Third Circuit stressed the primacy of content over motivation in determining the public concern issue. There, a public employee's charge that academic standards were being lowered, threatening the defendant University's accreditation, arose during the course of a personal disagreement. Although the employee's speech was "an outgrowth of a personal dispute", that fact did not "prevent some aspect of it from touching upon matters of public concern, as *Connick* itself makes clear". *Id.* at 451. In *Rode v. Dellarciprete*, 845 F.2d 1195 (1988), the Third Circuit held that, even though the plaintiff was the "disgruntled employee so disfavored in *Connick*", since his speech addressed a matter of public corruption, it was "of serious public import" and deserving of protection. *Id.* at 1201, 1202.

Thus, where serious allegations of mismanagement, breach of the public trust, corruption and misconduct of public officials are the substance of a public employee's speech, as they are in *O'Connor*, the Circuits agree that the speech is a matter of inherent public concern even if the motive for the speech is merely personal. As the First Circuit has said in this case, the content of that speech is of such inherent public concern that personal motive cannot preclude constitutional protection.

Since, under *Connick* and the other cases referenced above, the content of speech disclosing public corruption or misuse of

public office is dispositive on the issue of public concern, the First Circuit in this case properly held that the content of O'Connor's speech obviated the need for threshold analysis of O'Connor's "dominant motive for speaking out on these issues" (A-18). The First Circuit then properly rejected the Town's contentions that O'Connor's personal motives, based upon the "form and context" of his speech, "should result in the denial of First Amendment protection at the threshold" (A-19).

Moreover, the Petitioner's claim that O'Connor made "no effort to bring wrongdoing to public light" is factually wrong and legally trivial. An employee who speaks to supervisors about matters of public concern does not lose his constitutional protection because he has communicated privately. *Givhan v. Western Line Consolidated School District,* 439 U.S. 410, 415 (1979). In *Hyland v. Wonder,* 972 F.2d 1129 (1992), the Ninth Circuit, noting that the speech of a public employee in the form of a memorandum addressed "a classic topic of public concern the — inept, inefficient and potentially harmful administration of a governmental entity," *id.* at 1139, held that, because the memorandum was targeted at public officials most capable of effecting a change in the administration, the bringing of the attention of responsible public officials to this problem is "at least as important a communication for promoting democratic self-government as disclosure to the citizenry as a whole". *Id. Accord: Zamboni v. Stamler,* 847 F.2d 73 (3rd Cir. 1988), *cert. denied,* 488 U.S. 899 (1988); *Rookard v. Health and Hospitals Corporation,* 710 F.2d 41, 46 (2nd Cir. 1983); *Patrick v. Miller,* 953 F.2d 1240, 1247 (10th Cir. 1992). Indeed, the fact that a public employee tries to resolve his complaints about corruption privately with his superiors rather than in a public forum is to the credit of the employee. *Conaway v. Smith,* 853 F.2d 789, 798 (10th Cir. 1988).

Moreover, in this case, O'Connor did speak out in public and did address his complaints about Steeves' corruption to the proper

authorities. O'Connor addressed public meetings on at least two occasions about this issue, spoke with the Board of Selectmen on many occasions and wrote to them complaining of Steeves' misconduct (A-4, 5). Petitioner repeatedly implies that for Mr. O'Connor's speech to merit First Amendment protection, he was required to ensure that the general public was present during his public meetings with the Board of Selectmen, to arrange for a law enforcement office to investigate Mr. Steeves or to hold a press conference about Steeves' misconduct. (PB-8, 9). A public employee need not go to such lengths.

The decision by the First Circuit that O'Connor's speech was a matter of public concern conforms to this Court's decisions in *Connick, Rankin* and *Givhan* and reflects the holdings of the other Circuit Courts. Contrary to Petitioner's argument, there is no split within the Circuits and the writ should be denied.

III.

THE FIRST CIRCUIT HAS NOT IMPOSED A NEW AND UNREASONABLE STANDARD ON PUBLIC EMPLOYERS UNDER THE *PICKERING* BALANCING TEST.

In its *Pickering* analysis, the First Circuit held that the Petitioner had not demonstrated that any disruption of its services was "attributable to the exercise of O'Connor's First Amendment right to speak out on this subject, so as to warrant discharging him on speech-related grounds" (A-21). The court pointed out that the disruption described by the Town might well be the result of other causes, *id.*, and, therefore, the Town had failed to produce any evidence for the court to weigh against the "strong public interests" in O'Connor's disclosure.

The First Circuit's requirement that the Petitioner prove a

causal relationship between the alleged disruption and O'Connor's speech is not a "heightened proof requirement", as asserted by the Petitioner (PB-15), but a well-settled burden of proof. Various courts have held that the employer must demonstrate actual disruption arising from the public speech of the employee.

In *Connick, supra,* this Court reiterated the *Pickering* teaching that the "State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Connick, supra* at 150.

Where, as here, a public employee complains about the corruption, ineptitude or misconduct of public officials, the Circuit Courts have held *Pickering* to require that the employer justifying retaliatory discharge demonstrate not only actual disruption rather than potential disruption, but also a causal relationship between the speech and the disruption. In doing so, these courts have followed the lead of this Court in *Connick v. Myers,* 461 U.S. 138, 152 (1983) ("We caution that a stronger showing [than potential disruption] may be necessary if the employee speech more substantially involved matters of public concern"). In *Rankin v. McPherson,* 483 U.S. 378 (1987), this Court, after finding that the political expression of the public employee was a matter of public concern, found against the employer under the *Pickering* analysis because there was no evidence that the comment of the employee had actually disrupted the employer's office. *Id.* at 389. In *Pickering, supra,* this Court reversed the discharge of a public employee who had spoken out on a matter of public concern specifically because the employer had failed to prove that it had suffered any harm from the speech. *Pickering v. Board of Education,* 391 U.S. 563, 572 (1967). In *Solomon v. Royal Oak Township, et al.,* 842 F.2d 862, 866 (6th Cir. 1988), the Sixth Circuit highlighted the employer's burden of proof to show disruption caused by the speech. In rejecting the employer's claim that any disruption meets the test, the Court pointed to the

"*Pickering* analysis, which *focuses on disruption resulting from the speech,* not from events prior to the speech," (emphasis supplied).

The Circuit Courts have faithfully followed the teaching of this Court on this issue. They agree that, where a public employee discloses corruption or mismanagement, the interest of the general public and the employer in disclosure can only be outweighed, if at all, by a showing on the part of the employer that the disclosure caused a significant, actual disruption. In *Hyland v. Wonder,* 972 F.2d 1129 (1992), the Ninth Circuit pointed out that, "The more tightly the First Amendment embraces the speech, the more vigorous a showing of disruption must be made". *Id.* at 1139, *citing Connick.* In *Roth v. Veterans Administration of Government of the United States,* 856 F.2d 1401 (9th Cir. 1988), the plaintiff had disclosed unethical conduct, waste of resources, mismanagement and violation of safety regulations by his superiors. *Id.* at 1406. The court, after finding that these revelations were matters of public concern, required the public employer to demonstrate "actual, material and substantial disruption" under *Pickering. Id.* at 1407. In *Zamboni v. Stamler,* 847 F.2d 73, 78 (1988), the Third Circuit held that, where the employee had expressed himself on a matter of public concern, the proper administration of a county prosecutor's office, *id.* at 77, a "showing of *actual* disruption is required." *Id.* at 78. In *McKinley v. City of Eloy,* 705 F.2d 1110, 1115 (9th Cir. 1983), the Ninth Circuit said that "real, not imagined disruption is required" to justify disciplining an employee for speaking about management issues. In *American Postal Workers v. United States Postal Service,* 830 F.2d 294, 303, 304 (1987), the District Circuit Court of Appeals stressed that in employee discharge cases, *Pickering, Rankin* and *Connick* all require actual evidence of harm caused by the public employee's speech. The court there noted a long line of cases in which that Circuit had focused upon the need for proof of actual disruption. For example, in *Tygrett v. Washington,* 543 F.2d 840, 848 (D.C. Cir., 1974), the court stated

that, "The crucial question for decision was whether appellant's remarks . . . actually impinged upon qualities making for an effective police force in such manner as to imperil its efficiency".

These cases clearly require not only proof of disruption, but proof that it resulted from the exercise of the employee's speech. Without that requirement, disruption caused by any factor could justify an employee's termination. Clearly, that result would inadequately protect public employees, as various courts have said. For example, in *Roth, supra,* the court pointed out that public officials cannot "rely on disruption which they instigated or exacerbated, to outweigh [the employee's] rights". *Id.* at 1408. However, if the employer need not demonstrate causality, it may be able to justify retaliatory discharge on the very basis that *Roth* condemns.

The First Circuit held the defendant in this case must comply with the standard clearly established by this Court and other Circuits: where an employee speaks out on an abuse of a public trust by an incumbent elected official, as O'Connor did here, the employer, in order to justify retaliation, must demonstrate at a minimum, that the speech actually caused a disruption of services and operations. The Petitioner has not met that burden. Contrary to the Petitioner's argument, the First Circuit has not imposed either a new or unreasonable or heightened standard upon the Petitioner in this case.

CONCLUSION

For these reasons, the Respondent respectfully requests that the Petition for Certiorari be denied and that this Court decline summarily to reverse the decision of the First Circuit.

Respectfully submitted,

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